

A Critical Evaluation of the National Environmental Management Act (NEMA) Section 24G: Retrospective Environmental Authorisation

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DECLARATION

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ABSTRACT

After the publication of groundbreaking texts such as “*Silent Spring*” (Rachel Carson, 1962), “*The Tragedy of the Commons*” (Garrett Hardin, 1968), and “*The Population Bomb*” (Paul Ehrlich, 1970), environmental issues came to the forefront of society’s concern. In response, many governments began enacting strong environmental protection laws. South Africa is no exception, with the promulgation of the Environment Conservation Act (ECA), Act 73 of 1989, and subsequently the National Environmental Management Act (NEMA), Act 107 of 1998.

Despite thorough environmental framework legislation, non-compliance with environmental law remains common in South Africa. The controversial Section 24G of NEMA, entitled “*Consequences of unlawful commencement of activity*” attempts to address environmental non-compliance. S 24G allows individuals and companies who illegally commenced with an environmental activity prior to obtaining the necessary environmental authorisations to apply for retrospective authorisation.

The provision made for *ex post facto* (after the fact) environmental authorisation by s 24G is controversial, and a number of concerned individuals and environmental organisations have contested it. Concerns surrounding s 24G include the perception that s 24G leads to guaranteed environmental authorisation, and that s 24G can be used to save time by bypassing the traditional Environmental Impact Assessment (EIA) process. S 24G has been misused by companies who simply budget for the administrative fine and commence with illegal activities. In addition, many have argued that the administrative fine associated with s 24G is too low to constitute an effective deterrent.

The purpose of this research is to investigate whether s 24G is an effective deterrent to prevent non-compliance with environmental law. Past research, as well as information

obtained from the Western Cape Department of Environmental Affairs and Development Planning (DEA&DP) is used to analyse trends in s 24G applications and make recommendations for improving the deterrence potential of this legislation.

The findings of this research show that despite a consistent increase in the average administrative fine, the number of s 24G applications received by DEA&DP increases every year. However, it is argued that the number of s 24G applications received does not necessarily reflect an increase in environmental non-compliance, but an improved detection of environmental crimes. Most s 24G applications arise from ignorance. Therefore, although s 24G should be amended to increase its effectiveness as a deterrent, ignorance of environmental laws and regulations should be improved through compliance promotion.

OPSOMMING

Nadat innoverende tekste soos “*Silent Spring*” (Rachel Carson, 1962), “*The Tragedy of the Commons*” (Garrett Hardin, 1968), en “*The Population Bomb*” (Paul Ehrlich, 1970) gepubliseer is, het omgewingskwessies na die voorpunt van die samelewing se aandag gekom. In reaksie hierop het baie regerings sterk omgewingswette begin toepass. Suid-Afrika is geen uitsondering, met die promulgering van die Omgewingsbewaaringswet (OBW), Wet 73 van 1989, en daarna die Nasionale Omgewingsbestuurswet (NOBW), Wet 107 van 1998.

Ten spyte van deeglike omgewings raamwerkwetgewing, bly nie-nakoming van die omgewingswet algemeen in Suid-Afrika. Die omstrede Artikel 24G van NOBW, getiteld “*Consequences of unlawful commencement of activity*” poog om omgewings nie-nakoming aan te spreek. Volgens a 24G kan individue en maatskappye wat onwettig begin met 'n omgewings aktiwiteit voor die verkryging van die nodige omgewingsmagtigings aansoek doen vir terugwerkende magtiging.

Die voorsiening wat gemaak is vir *ex post facto* (na die feit) omgewingsmagtiging deur a 24G is omstrede, en 'n aantal besorgde individue en omgewings organisasies het dit betwis. Bekommernisse omliggend a 24G sluit in die persepsie dat a 24G lei tot gewaarborgde omgewingsmagtiging, en dat a 24G gebruik kan word om tyd te spaar deur om die tradisionele Omgewingsimpakstudie (OIS) proses te vermy. A 24G was al misbruik deur maatskappye wat net begroot vir die administratiewe boete en dan begin met onwettige aktiwiteite. Baie mense het ook al aangevoer dat die administratiewe boete wat verband is met a 24G te laag is om 'n doeltreffende afskrikmiddel te wees.

Die doel van hierdie navorsing is om te ondersoek of a 24G 'n doeltreffende afskrikmiddel vir nie-nakoming van die omgewings reg is. Vorige navorsing, sowel as inligting wat verkry is van die Wes-Kaapse Departement van Omgewingsake en

Ontwikkelingsbeplanning (DOS&OB) is gebruik om tendense in a 24G aansoeke te ontleed en aanbevelings te maak vir die verbetering van die afskrikking potensiaal van hierdie wetgewing.

Die bevindinge van hierdie navorsing toon dat ten spyte van 'n konsekwente toename in die gemiddelde administratiewe boete, verhoog die aantal a 24G aansoeke wat deur die DOS&OB ontvang is elke jaar. Dit word egter aangevoer dat die getal a 24G aansoeke wat ontvang is nie noodwendig 'n toename in die omgewings nie-nakoming beteken nie, maar eerder 'n beter opsporing van omgewings misdade. Die meeste a 24G aansoeke kom van onkunde. Daarom, alhoewel a 24G gewysig moet word om 'n meer doeltreffende afskrikmiddel te wees, moet onkunde van omgewingswette en regulasies verbeter word deur voldoening bevordering.

TABLE OF CONTENTS

DECLARATION	ii
ABSTRACT.....	iii
OPSOMMING	v
LIST OF TABLES.....	x
LIST OF FIGURES	xi
ADDENDA	ix
ACRONYMS AND ABBREVIATIONS	xii
CHAPTER 1: INTRODUCTION.....	1
1.1 INTRODUCTION	1
1.2 PROBLEM STATEMENT	2
1.3 RESEARCH QUESTION, OBJECTIVES AND METHODOLOGY	3
1.4 OUTLINE OF CHAPTERS	4
1.5 SUMMARY	4
CHAPTER 2: NATIONAL ENVIRONMENTAL MANAGEMENT.....	6
2.1 INTRODUCTION	6
2.2 THE TRAGEDY OF THE COMMONS, ENVIRONMENTAL AWARENESS, AND THE EVOLUTION OF SUSTAINABLE DEVELOPMENT.....	6
2.3 BACKGROUND ON THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NEMA)	10
2.4 THE ENVIRONMENTAL MANAGEMENT PRINCIPLES UNDER NEMA	12
2.5 THE DUTY OF CARE UNDER NEMA	13
2.6 INTEGRATED ENVIRONMENTAL MANAGEMENT AND ENVIRONMENTAL IMPACT ASSESSMENT UNDER NEMA	13
2.7 THE POLLUTER PAYS PRINCIPLE	17
2.8 SUMMARY	17
CHAPTER 3: <i>EX POST FACTO</i> ENVIRONMENTAL AUTHORISATION UNDER NEMA.....	19
3.1 INTRODUCTION	19
3.2 STEPS OF A S 24G APPLICATION	19
3.3 UNCLEAR PURPOSE AND EFFECTS OF S 24G	20
3.4 CRITICISM OF S 24G RETROSPECTIVE ENVIRONMENTAL AUTHORISATION	21
3.5 THE ROLE OF THE S 24G ADMINISTRATIVE FEE IN DETERRING NON- COMPLIANCE.....	24

3.6	S 24G IN OTHER COUNTRIES.....	27
3.7	CONSTITUTIONALITY OF S 24G CHALLENGED	27
3.8	PAST AMENDMENTS TO S 24G	28
3.9	SUMMARY	29
CHAPTER 4: WESTERN CAPE CASE STUDY		30
4.1	INTRODUCTION	30
4.2	THE WESTERN CAPE AS A CASE STUDY.....	30
4.3	DATA COLLECTION PROCESS	31
4.4	STATISTICAL INFORMATION	32
4.5	STATISTICAL ANALYSIS.....	32
4.6	S 24 G APPLICATIONS RECEIVED.....	32
4.7	SECTORS INVOLVED IN S 24G APPLICATIONS	33
4.8	MOST PREVALENT ILLEGAL ACTIVITIES.....	35
4.9	S 24G ADMINISTRATIVE FINES	35
4.10	ANALYSIS	37
4.11	SUMMARY	39
CHAPTER 5: RECOMMENDATIONS FOR IMPROVING THE EFFECTIVENESS OF S 24G AS A DETERRENT FOR CONTRAVENING ENVIRONMENTAL LAW		41
5.1	INTRODUCTION	41
5.2	THE CENTRE FOR ENVIRONMENTAL RIGHTS' RECOMMENDATIONS	41
5.3	STAKEHOLDER SUGGESTIONS AND RECOMMENDATIONS	47
5.4	IMPROVING THE EFFECTIVENESS OF THE CONTROVERSIAL ADMINISTRATIVE FINE AS A DETERRENT	49
5.5	DIFFICULTIES WITH PRACTICAL IMPLEMENTATION OF RECOMMENDATIONS	55
5.6	SUMMARY	56
CHAPTER 6: PREVENTION IS BETTER THAN A CURE: IMPROVING ENVIRONMENTAL COMPLIANCE		57
6.1	INTRODUCTION	57
6.2	COMPLIANCE WITH ENVIRONMENTAL LAW	57
6.3	IMPROVING COMPLIANCE WITH ENVIRONMENTAL LAW	61
6.4	BENEFITS OF COMPLIANCE	73
6.5	POSITIVE AND NEGATIVE INCENTIVES.....	73
6.6	COMPLIANCE PROMOTION THROUGH EDUCATION AND SUPPORT	74

6.7	THE IMPORTANCE OF EFFECTIVE ENFORCEMENT IN PROMOTING COMPLIANCE.....	76
6.8	HOW COMPLIANCE PROMOTION CAN BE USED WITH REGARDS TO S 24G.....	77
6.9	SUMMARY	78
CHAPTER 7: CONCLUSION		79
7.1	INTRODUCTION	79
7.2	REASONS FOR INCREASE IN S 24G APPLICATIONS.....	79
7.3	REDUCING NON-COMPLIANCE DUE TO IGNORANCE.....	79
7.4	REDUCING NON-COMPLIANCE DUE TO WILLFUL DISREGARD	80
7.5	NECESSITY OF S 24G	81
7.6	RECOMMENDATIONS.....	81
7.7	SUMMARY	82
REFERENCE LIST		83

ADDENDA

Addendum A: NEMA Sections 24F and 24G as amended on 18 December 2013 by the National Environmental Management Laws Second Amendment Act, Act 30 of 2013.

Addendum B: 2011 submission by the Centre for Environment Rights to the DEA, including stakeholder comments and input. Contains Annexure A: NEMA s 24F and 24G; Annexure B: S 24F and 24G marked-up with explanatory notes; and Annexure C: Comments and inputs.

LIST OF TABLES

Table 4.1: The Number of s 24G administrative fines paid, amounts paid, and average fine between 2006 and 2014.....	35
Table 6.1: Environmental Management Inspectorates per institution (DEA, 2014:6).....	66
Table 6.4: The number of compliance monitoring inspections undertaken by various EMI Institutions during 2013/14 (from DEA, 2014:15).....	71
Table 6.5: Number of “brown” facilities inspected by various EMI Institutions during 2013/14 (DEA, 2014:16).	72

LIST OF FIGURES

Figure 2.1: The “ <i>Integration Model</i> ” of Sustainable Development (from Mebratu, 1998:513).	8
Figure 2.2: The “Interdependence Model of Sustainable Development” (from Gerber, 2012:21, adapted from Mebratu, 1998:513	9
Figure 2.3: The The “Embedded Model” (from DEA&DP and WCPDC, 2005).	9
Figure 2.4: The number of EIA applications in South Africa from 1997-2006 (from September, 2012:6, adapted from Kidd and Retief, 2009).	15
Figure 4.1: The number of s 24G application received by DEA&DP between 2006 and 2014 for listed activities under NEMA.	33
Figure 4.2: Number of s 24G applications between 2006 and 2014 originating from various sectors.	34
Figure 4.3: Average amounts of s 24G administrative fines between 2006 and 2014.	36
Figure 6.2: The number of administrative enforcement tools (i.e. directives and notices) utilised by EMI Institutions during 2013/14 (from DEA, 2014:29).	72

ACRONYMS AND ABBREVIATIONS

A 24G	Artikel 24G van die Nasionale Omgewingsbestuurswet, Wet 107 van 1998
BA	Basic Assessment
CER	Centre for Environmental Rights
CSO	Civil Society Organisation
DAEA	Department of Agriculture and Environmental Affairs
DEA	National Department of Environmental Affairs
DEA&DP	Department of Environmental Affairs and Development Planning
DEDECT	Department of Economic Development, Environment, Conservation and Tourism
DEDET	Department of Economic Development, Environment and Tourism
DEDTEA	Department of Economic Development, Tourism and Environmental Affairs
DOS&OB	Departement van Omgewingsake en Ontwikkelingsbeplanning
EA	Environmental Authorisation
EAP	Environmental Assessment Practitioner
ECA	Environment and Conservation Association
ECA	Environment Conservation Act, Act No. 73 of 1989
EIA	Environmental Impact Assessment
EIRIS	Ethical Investment Research and Information Service
EMF	Environmental Management Framework
EMI	Environmental Management Inspector

EMP	Environmental Management Plan
EPA	Environmental Protection Agency (US)
GDARD	Gauteng Department of Agriculture and Rural Development
I&AP	Interested and Affected Party
IBRD	International Bank for Reconstruction and Development
IEM	Integrated Environmental Management
INECE	International Network for Environmental Compliance and Enforcement
JSE	Johannesburg Stock Exchange
MEC	Member of the Executive Council
NECER	National Environmental Compliance and Enforcement Report
NEM:WA	National Environmental Management: Waste Act, Act No. 59 of 2008
NEMA	National Environmental Management Act, Act No.107 of 1998
NOBW	Nasionale Omgewingsbestuurswet, Wet 107 van 1998
OBW	Omgewingsbewaaringwet, Wet 73 van 1989
OECD	Organisation for Economic Co-operation and Development
OIS	Omgewingsimpakstudie
SANParks	South African National Parks
Scoping & EIR	Scoping and Environmental Impact Report
SEA	Strategic Environmental Assessment
SEMA	Specific Environmental Management Acts
SRI	Socially Responsible Investment
S 24G	Section 24G of the National Environmental Management Act, Act No. 107 of 1998
WCED	World Commission on Environment and Development
WCPDC	Western Cape Provincial Development Council

WESSA

Wildlife and Environment Society of South Africa

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

Before the existence of environmental law, businesses and individuals were free to exploit the environment for their own gain, with little consideration for sustainable development. Infrastructure could replace a well-functioning wetland or a pristine river, at the discretion of the developer. However, such practices changed when environmental management and environmental assessment were introduced into South Africa's legislation. Businesses and individuals are now required to consider the environmental impacts of their actions, as well as identify measures to mitigate these impacts. Gone are the days when the environment was simply a resource for people to exploit as they please.

The turning point for environmental legislation in South Africa was when the historic 1996 Constitution included for the first time an environmental right. This environmental right states that every citizen has the right to an environment which does not negatively affect their health, and that the environment is protected for subsequent generations. South Africa's framework environmental legislation, the National Environmental Management Act (Act 107 of 1998) (NEMA) was adopted in 1998 in order to give effect to the environmental right stated in the Constitution (Republic of South Africa, 1998). NEMA contains certain principles designed to promote the responsible use of environmental resources and encourage sustainable development in South Africa. NEMA also contains a number of listed activities which require environmental authorisation from the competent authority before commencement.

NEMA describes the widely used Environmental Impact Assessment (EIA) tool, which is designed to inform decision makers of the possible environmental impacts of projects. EIA is intended to promote sustainable development by encouraging the mitigation of environmental impacts of activities, or where mitigation is not feasible, the rejection of environmentally

damaging activities (Wood, 1995:1). EIA is only one of the environmental management tools described within NEMA.

In spite of South Africa's progressive environmental framework legislation, the environment continues to be threatened by non-compliant individuals and businesses. According to Craigie *et al.* (2009:41): "*governance and regulation are largely meaningless without compliance*", and environmental non-compliance is widespread in South Africa. Although sensational non-compliance issues such as poaching tend to receive the most media attention, the 2010/11 National Environmental Compliance and Enforcement Report (NECER) found that the illegal commencement of listed activities was the most common crime in every province excluding the Northern Cape (DEA, 2011).

Section 24G of NEMA intends to address the unlawful commencement of listed activities. S 24G is entitled "*Rectification of unlawful commencement of activity*" and was included by the National Environmental Management Amendment Act (Act 8 of 2004)(Republic of South Africa, 2004), with effect from January 7, 2005. S 24G allows an individual or business who commenced with a listed activity prior to obtaining environmental authorisation to apply to the Minister or MEC for retrospective authorisation, subject to an administrative fee.

1.2 PROBLEM STATEMENT

S 24G of NEMA has become extremely controversial and is contended by individuals and interest groups alike. Although in many cases unlawful commencement of a listed activity is due to ignorance of environmental law, unlawful commencement can also be due to deliberate non-compliance. Deliberate non-compliance by individuals or businesses can be motivated by a desire to save time (the entire EIA process takes on average six months to a year), which in turn increases profits (September, 2012). Businesses have been observed to illegally commence with a listed activity in order to begin production, and simply budget for the s 24G administrative fine as an overhead cost (CER, 2011).

Without adequate financial penalties, the practice of businesses and individuals budgeting for the s 24G administrative fine and illegally commencing with listed activities will continue. S

24G will eventually be considered an easier method of obtaining environmental authorisation, compared to the traditional EIA process, especially since approval rates of s 24G applications have been found to be similar to approval rates for traditional EIAs (September, 2012:55). A situation will arise whereby honest, law-abiding people are disadvantaged compared to environmental offenders (September, 2012:53). In fact, whether or not s 24G fines are a proper deterrent for possible offenders is a heavily contested issue which will be examined in this thesis.

1.3 RESEARCH QUESTION, OBJECTIVES AND METHODOLOGY

The following research critically examines the effectiveness of s 24G in supporting and upholding South Africa's environmental legislation by asking the question: is s 24G an effective deterrent for contravening environmental law in South Africa?

A theoretical component will include an analysis of past research and writings on environmental law, NEMA s 24G, environmental compliance/enforcement, and the effectiveness of financial penalties in deterring non-compliance.

Based on the theoretical background, as well as statistical information regarding s 24G records in the Western Cape, the value of s 24G in encouraging compliance with environmental law will be critically evaluated. This research aims to explore the opportunities as well as difficulties caused by s 24G with regards to compliance and enforcement, and whether s 24G may actually undermine the very environmental legislation it is intended to uphold.

The research methodology is evaluative research, with a combination of secondary qualitative and quantitative data collected by others. Evaluative research design can be defined as research which aims to critically appraise or judge the effectiveness, value or worth of the subject (Miller-Keane Encyclopedia, 2003). Interviews with relevant government officials and stakeholders were not undertaken as part of this research, therefore information gathered from interviews during other studies (namely September, 2012 and the Centre for Environmental Rights, 2011) was used to inform the research.

1.4 OUTLINE OF CHAPTERS

An overview of National environmental management provides background on the evolution of, and objectives of, environmental law in South Africa. The overview includes past research on s 24G, the prevailing arguments against this legislation, as well as theories surrounding environmental compliance and enforcement, how compliance with legislation can be improved, and the role of the s 24G administrative fee in deterring non-compliance (**Chapter 2**). **Chapter 2** provides the necessary context for exploring and interpreting the results of the research and interviews. **Chapter 3** describes s 24G and the main arguments against this legislation, while **Chapter 4** presents the main findings of this research and provides an analysis of results. **Chapter 5** contains recommendations for the improvement of s 24G using the theory summarised in **Chapter 2** as well as the findings presented in **Chapter 4**. **Chapter 6** consists of recommendations regarding compliance promotion, while **Chapter 7** is a conclusion of the research.

1.5 SUMMARY

South Africa has thorough environmental legislation, including the framework environmental legislation, NEMA, which was adopted in 1998 in order to give effect to the environmental right stated in the Constitution. NEMA describes the important EIA process, which is designed to inform decision makers of the possible environmental impacts of projects and thus promote sustainable development by encouraging the mitigation of environmental impacts of activities (Wood, 1995:1). However, in spite of South Africa's environmental legislation, the environment continues to be threatened by non-compliant individuals and businesses. Section 24G of NEMA, which intends to address the unlawful commencement of listed activities, allows an individual or business who commenced with a listed activity prior to obtaining environmental authorisation to apply to the Minister or MEC for retrospective authorisation. S 24G has been heavily criticised and opposed by many stakeholders. The purpose of this research is to determine the effectiveness of s 24G in supporting and upholding South Africa's environmental legislation.

CHAPTER 2

NATIONAL ENVIRONMENTAL MANAGEMENT

2.1 INTRODUCTION

To investigate the phenomenon of s 24G in South Africa's environmental legislation, this Chapter considers the background of environmental law in South Africa, including sustainable development, NEMA and the EIA process, and compliance with environmental law and how compliance can be improved. With a specific focus on the purpose and effect of s 24G in the environmental legislation, this review examines criticism of s 24G retrospective environmental authorisation from a variety of sources, including concerned members of society, as well as environmental organisations. The s 24G administrative fine and its role as a deterrent for non-compliance with environmental law is also discussed.

2.2 THE TRAGEDY OF THE COMMONS, ENVIRONMENTAL AWARENESS, AND THE EVOLUTION OF SUSTAINABLE DEVELOPMENT

In 1968, Garrett Hardin published "*The Tragedy of the Commons*" in the journal, *Science*. In this famous essay, Hardin argues that individuals, whether consciously or subconsciously, pursue their own short-term interests, which are usually at a cost to the environment, to society in general, and ultimately to the individuals themselves. Hardin argues for environmental governance and a holistic, long-term outlook on decision-making to ensure that the earth's resources are conserved (Gerber, 2012:12).

Hardin depicts a "*Tragedy of the Commons*" by describing a scenario first explained by mathematician William Forster Lloyd in 1833. The scenario entails an open access pasture. Each herdsman utilising this pasture is likely to graze as many livestock on the pasture as he can. A rational person usually desires to maximise his own profit, and by grazing an additional unit of livestock, the herdsman benefits from selling one more animal. However, the impact of the extra unit of livestock on the quality of the pasture is borne by all the herdsmen using the commons. Therefore, it is in the selfish best interest of the individual herdsman to increase

the size of his herd, as the benefits of an additional animal are solely reaped by him, whereas the costs are shared amongst all the herdsman. If each herdsman follows the same pattern, the commons will soon be overgrazed and depleted. Hardin concludes that this freedom in a commons leads to eventual ecological destruction.

According to Gerber (2012:12), as a remedy for the above situation, Hardin calls for: “*the proposed actions of individuals to be governed and measured against the long-term public interest.*” Gerber (2012:12) believes that Hardin’s essay is essentially an argument in favour of sustainable development.

Hardin’s “*Tragedy of the Commons*” speaks to the unscrupulous misuse and exploitation of environmental resources by individuals, businesses and even entire countries observed in the present day. In fact, it is such unscrupulous individuals and businesses who eventually apply for *ex post facto* environmental authorisation under s 24G.

In addition to Hardin’s “*The Tragedy of the Commons*”, other revolutionary publications in the 1960’s and 1970’s such as “*Silent Spring*” (Rachel Carson, 1962) and “*The Population Bomb*” (Paul Ehrlich, 1970) brought the issue of environmental degradation and sustainable development to the forefront of society during the 1980’s (Gerber, 2012:14).

Sustainable development, as a new concept, was first thought to be a balance reached between economists, social scientists and ecologists, and the aim of sustainable development became the effective integration of development and environmental components. Thus the “*Integration Model*” (**Figure 2.1** below) was the most used model of sustainable development (Gerber, 2012:14). However, Mebratu (1998:513) argues that the “*Integration Model*” falsely assumes that ecological, social and economic systems are completely separate systems, which do not rely on one another. In this model, the area where the three components overlap is referred to as the interactive zone, which is where sustainable development would occur (Mebratu, 1998:513). Sustainable development is therefore promoted by effective integration of the three systems (Gerber, 2012:15).

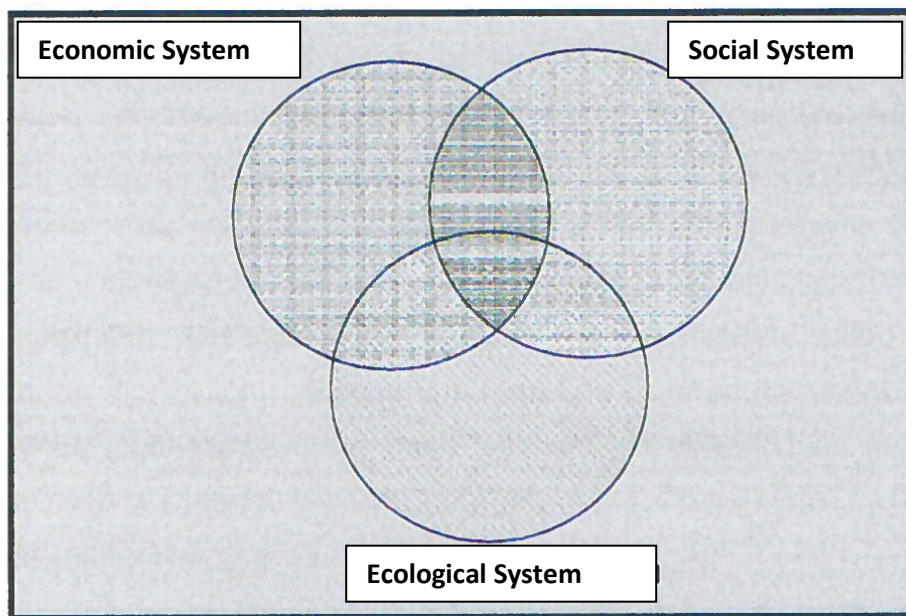


Figure 2.1: The “*Integration Model*” of Sustainable Development (from Mebratu, 1998:513).

The “*Integration Model*” of sustainable development led to a concentration on reducing impacts on the environment while still developing socially and economically. Therefore, an attitude of “*business-as-usual*” was adopted, continuing with the same practices but making them slightly better. Mitigation of environmental impacts was considered to be sufficient to move into the zone of sustainable development (Gerber, 2012:15). Those who followed this model (also known as ecological modernisation) believed that capitalism and environmentalism were not necessarily in opposition, and that the use of ecologically friendly technology could improve development (King and McCarthy, 2005).

The above model of sustainable development was applied until “*Complexity Theory*” and “*Systems Thinking*” prompted the idea that economic, social and ecological systems are not separate, but instead are interdependent and therefore are constantly interacting and influencing each other (Kast and Rosenzweig, 1972; Clayton and Radcliffe, 1996; Mebratu, 1998; Cilliers, 1998; Cilliers, 2000a; Cilliers 2000b; Noble, 2000; Jessop, 2001). This realisation led to the development of the “*Interdependence Model of Sustainable Development*” (or, the “*Nested Systems Model*”) (**Figure 2.2** below). In this model, the dependence of the social and economic systems on the ecological system as the overall

resource base is depicted (Gerber, 2012:21). The “*Interdependence Model of Sustainable Development*” illustrates the dependence of the social system on the ecological system, and the dependence of the economic system on the social system (Gallopin, 2003; Blignaut and de Wit, 2004; Tisdell, 2004; DEA&DP and WCPDC, 2005). In order to achieve sustainable development, economic, social and environment sustainability must be simultaneously reached (“*The Triple Bottom Line*”) (Visser and Sunter, 2002:15; Elkington, 2004).

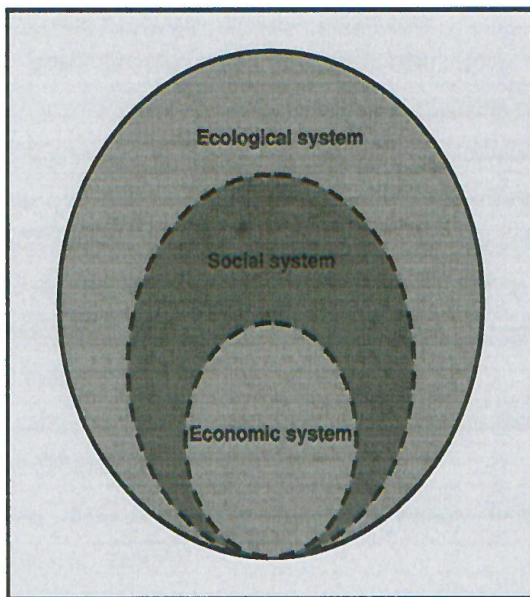


Figure 2.3: The “*Interdependence Model of Sustainable Development*” (from Gerber, 2012:21, adapted from Mebratu, 1998:513).

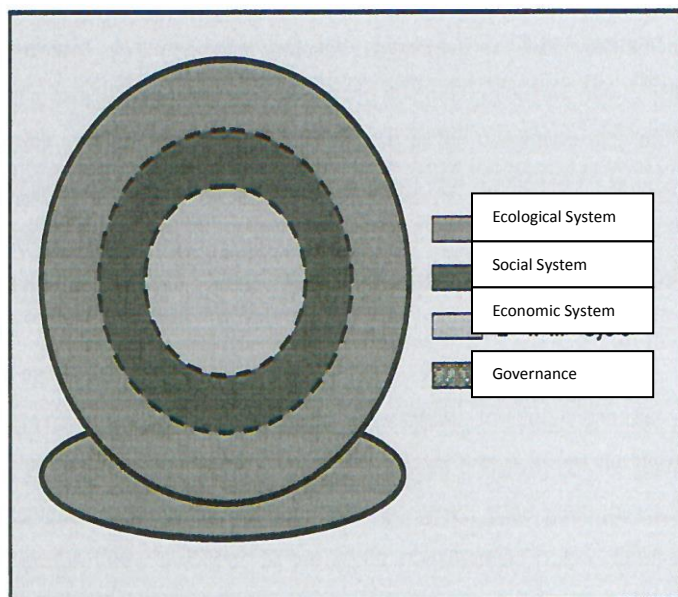


Figure 2.2: The “*Embedded Model*” (from DEA&DP and WCPDC, 2005).

In recent times, the Embedded Model (**Figure 2.3** above) has been developed in response to the idea that the three interdependent systems necessitate integrated governance (DEA&DP and WCPDC, 2005).

In 1987, the World Commission on Environment and Development (also known as the Brundtland Commission) published a report called “*Our Common Future*”, which contained the now widely recognised definition of sustainable development as: “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*” (WCED, 1987).

As a result of the need for integrated governance, tools promoting sustainable development, such as EIA and development planning have been developed in South Africa (Gerber, 2012:22). According to Gerber (2012:22), the EIA process was designed for the government to be able to make informed decisions in the simultaneous pursuit of economic, social and ecological objectives, for the ultimate goal of sustainable development.

THE CONNECTION BETWEEN ENVIRONMENTAL COMPLIANCE, SUSTAINABLE DEVELOPMENT, AND S 24G

The EIA process in South Africa is a tool for the promotion of sustainable development, which is described in Section 2.2. The EIA process relies on effective and consistent compliance from those undertaking environmental activities. By providing a solution for those who have undertaken environmental activities which may not otherwise have been authorised, s 24G is not upholding or encouraging environmental compliance. In fact, s 24G offers a relatively easy way out for those who have been non-compliant, and this non-compliance was deliberate. In offering a way around the EIA process for potentially damaging environmental activities, s 24G is inhibiting the effective implementation of sustainable development in South Africa.

2.3 BACKGROUND ON THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NEMA)

According to Van der Linde (2009:193), a combination of three legislative mechanisms is used to protect the environment in South Africa. The first mechanism is the environmental right stipulated in the Constitution. The second mechanism is specific environmental laws addressing various environmental issues, such as the National Forest Act (Act 84 of 1998)(Republic of South Africa, 1998). The third mechanism, which will be discussed in detail below, is the environmental framework legislation (Van der Linde, 2009:193).

NEMA is the framework environmental legislation which enables the environmental preservation detailed in the Constitution. NEMA allows for the regulation of all spheres of the

environment, including waste management and air pollution. NEMA also allows for the adoption of complementary subsidiary laws to allow for more defined protection of specific environmental resources. Environmental framework legislation such as NEMA is designed to simplify co-operative environmental governance between different governmental spheres and different government departments (Van der Linde, 2009:194).

Before NEMA was enacted, the framework environmental legislation in South Africa was the Environment Conservation Act (ECA), Act 73 of 1989 (Republic of South Africa, 1989). The ECA, like NEMA, contained a number of listed activities which may harm the environment. These listed activities had to be applied for through the EIA process as stipulated in the ECA (Gerber, 2012:40). Proceeding with a listed activity prior to obtaining environmental authorisation was a criminal offence under the ECA, although there were no stipulated remedies for such situations. Authorities therefore applied methods such as those in s 28 of NEMA (eg. duty of care)(September, 2012:7). The ECA was replaced by new environmental framework legislation, NEMA, in 1998. In April 2006, new EIA regulations were promulgated under NEMA, replacing the EIA regulations of the ECA, as well as introducing new conditions with regards to EIAs (Gerber, 2012:52).

On 4 December 2014, the new 2014 NEMA EIA Regulations were promulgated. According to the new regulations, the two EIA processes (Basic Assessment [BA] and Scoping and Environmental Impact Report [Scoping & EIR]) remain, although the timeframes for the steps in the EIA process changed. Under the 2010 EIA Regulations, only the steps of the authorities were subject to a timeframe. However, under the new 2014 Regulations, all the steps in the EIA process, including the EAP's compilation of the report have a timeframe (Basic Assessment: 197 or 247 days, Scoping & EIR: 300 or 350 days).

In addition to amending the EIA timeframes, the new EIA Regulations include provision for a Closure Plan to be included with the application for environmental authorisation. A Closure Plan is applicable to activities involving decommissioning and closure. In the 2014 NEMA EIA Listing Notices, the use of the term "*construction*" is replaced by development, in order to include the operational phase of the activity. Therefore, instead of an activity reading "*construction of...*" activities will now read "*the development and related operations of...*".

According to Van der Linde (2009:197), NEMA deals with multiple weaknesses of past environmental legislation, and consists of “*four distinct pillars*”. The first pillar of NEMA is ensuring sound environmental decision making through the National Environmental Management Principles (described in more detail below), as well as various procedures described for increasing the quality of environmental decisions. These Environmental Management Principles provide guidelines for competent authorities when making decisions in terms of NEMA. The second pillar of NEMA encourages co-operative governance through various means such as Environmental Management Plans (EMPs). The third pillar of NEMA described by Van der Linde (2009:198) is the participation of the public in environmental governance through various forums and public participation processes. The last pillar of NEMA is giving effect to the environmental right as outlined in the Bill of Rights (Van der Linde, 2009:198).

Within NEMA there are a number of “*listed activities*” which may have an impact on the environment and therefore may not commence without environmental authorisation from the competent authority. Listed activities include, for example, construction within 32 meters of a watercourse outside an urban area, or the construction of activities for the concentration of animals for meat production. In order to attain environmental authorisation for a listed activity, NEMA stipulates that an EIA process must be followed.

2.4 THE ENVIRONMENTAL MANAGEMENT PRINCIPLES UNDER NEMA

The National Environmental Management Principles found in Chapter 1 of NEMA are crucial to effective environmental management, as they assist in the environmental decision making process. All governmental spheres and departments are subject to these principles, and must consider the principles before making decisions in terms of NEMA or any other environmental legislation. According to Van Der Linde (2009:198), these principles: “...*guide the interpretation, administration and implementation of NEMA and any other law concerned with the protection or management of the environment.*” The 18 environmental management principles under NEMA contain the “*Precautionary Principle*”, the “*Preventative Principle*” and the “*Polluter Pays Principle*”, amongst others (Van der Linde, 2009:201).

2.5 THE DUTY OF CARE UNDER NEMA

Section 28 of NEMA describes the “*duty of care*” bestowed upon environmental polluters. This duty of care states that:

“Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing, or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.”

The duty of care clearly applies to historic/past pollution (Van der Linde, 2009:211).

According to Van der Linde (2009:212), reasonable measures as mentioned in the duty of care may include the following:

1. Examining and evaluating the effect of activities on the environment;
2. Changing or minimising processes or actions which lead to pollution;
3. Preventing the spread of pollutants; and
4. Fixing the impacts of the pollution

If the individual or business does not comply with their duty of care, the competent authority may order them to do so. If they still fail to comply, the government may proceed with rectifying the situation themselves, at the cost of the person responsible for the damage (Van der Linde, 2009: 212).

2.6 INTEGRATED ENVIRONMENTAL MANAGEMENT AND ENVIRONMENTAL IMPACT ASSESSMENT UNDER NEMA

Integrated Environmental Management (IEM), although not explicitly defined under NEMA, refers to: “*an integrated approach to resource utilisation*” (Van der Linde, 2009:203). IEM is designed to integrate the principles of NEMA mentioned above into every governmental decision which may affect the environment. The EIA process forms an important part of IEM (Van der Linde, 2009:203).

Environmental Impact Assessment (EIA) is made up of a variety of processes and procedures which anticipate and evaluate the environmental results of human actions (September, 2012:5). EIA is a crucial component of environmental management and represents a significant effort to promote environmentally sustainable development (Kidd and Retief, 2009:971). According to Wood (1995:1): *“EIA should lead to informed decisions about potentially significant actions, and to positive benefits to both proponents and to the population at large.”* EIA is not intended to prevent activities with significant environmental consequences from occurring, rather, EIA is intended to provide decision makers with complete knowledge of the environmental impacts of a proposed action before the action takes place (Wood, 1995:2).

EIA is arguably the most important tool available for environmental planning, and is a crucial component of the environmental law. In South Africa alone, thousands of EIAs are conducted annually (Kidd and Retief, 2009) (refer to **Figure 2.4** below). However, the EIA process is not free from problems and critics, and criticism of this process includes doubts regarding the degree to which the process influences decision-making (September, 2012:6). Cashmore (2004:404) states that, *“while there is a general consensus that EIA has led to enhanced consideration of environmental factors in decision-making, its achievements appear most favourable when compared to past neglect and failings, rather than when measured against sustainable development goals.”* In other words, the EIA process is better than nothing, but is still not contributing sufficiently to sustainable development (Cashmore, 2004:404).

Other concerns regarding the EIA process include the amount of time and money spent on the process, and the poor quality of some reports (Sandham and Pretorius, 2008; Retief and Chabalala, 2009; Sandham *et al.*, 2010). The EIA process has often been blamed for delaying projects, and thus hindering development and economic growth (September, 2012:7).

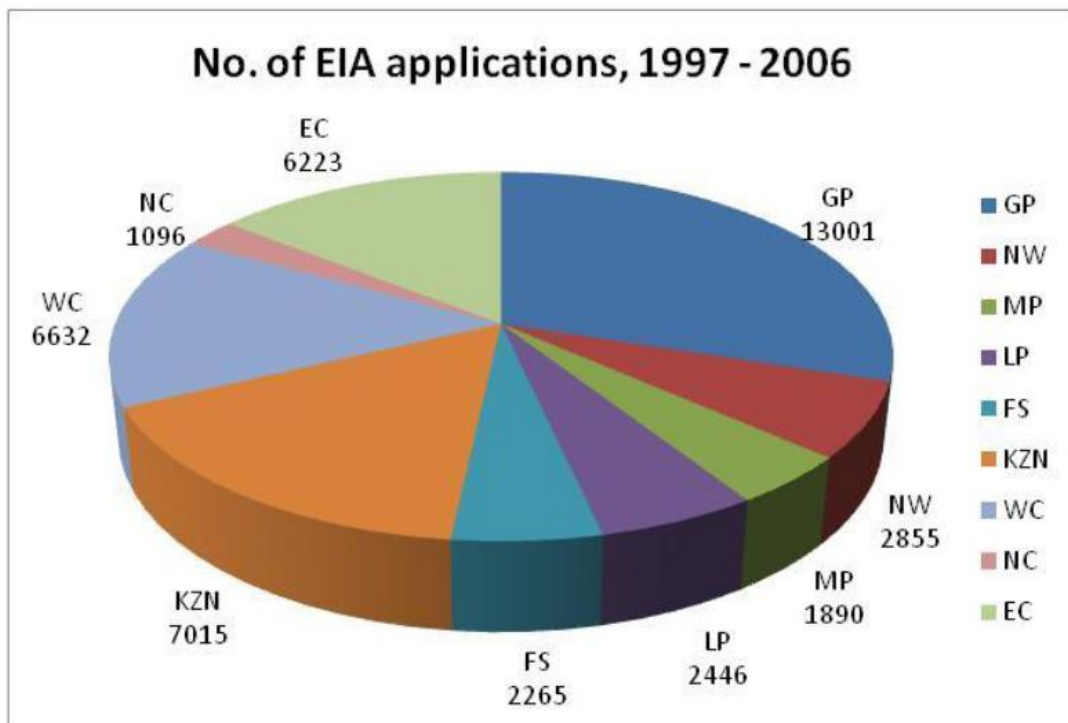


Figure 2.4: The number of EIA applications in South Africa from 1997-2006 (from September, 2012:6, adapted from Kidd and Retief, 2009).

Despite some criticism of the EIA process, over the last 40 years, the EIA has changed from a voluntary, *ad hoc* process to a legal requirement (Kidd and Retief, 2009:971). The formalisation of the EIA process was aided by the inclusion of an environmental right in the Bill of Rights (Paschke and Glazewski, 2006:3). The EIA process can be used with other environmental management tools such as Strategic Environmental Assessment (SEA) and Environmental Management Framework (EMF), which assist in assessing cumulative impacts (September, 2012:6).

The basic foundation of environmental assessment is its anticipatory nature, and it aims to ensure that environmental impacts are understood before development is approved and includes plans to mitigate these impacts (Paschke and Glazewski, 2006:1). In fact, Wood (1995:1) describes EIA as: “*an anticipatory, participatory environmental management tool...*” NEMA is also forward-looking (Paschke and Glazewski, 2006:9). For example, the following provisions and regulations in NEMA pertain to the potential environmental impacts of proposed activities:

- According to Chapter 5 (24[1]) of NEMA, the “*potential*” environmental consequences or impacts of activities must be identified, studied, and presented to the competent authority.
- Chapter 5 (24[4a(iii)]) of NEMA states that applications for environmental authorisation must include a description of the environment likely to be impacted by the “*proposed activity*”.
- According to EIA Regulation 17 (b) the EAP compiling the EIA report must be knowledgeable regarding NEMA and the EIA regulations as they pertain to the “*proposed activity*”.
- EIA Regulation 22 (2[g]) requires that the need and desirability of the “*proposed*” activity is described.
- The EIA Regulations also require the EAP to identify the “potential” environmental effects of the “proposed” activity during the scoping process.

As is evident above, the EIA regulations do not concern authorisation of an activity that has already been undertaken or finished. NEMA is written in language referring to the authorisation of prospective activities only (Paschke and Glazewski, 2006:10).

Furthermore, the Environmental Management Principles in Section 2 of Chapter 1 of NEMA contain the following provisions (Paschke and Glazewski, 2006:12):

- *Development must be socially, environmentally and economically sustainable;*
- *Sustainable development requires the avoidance of:*
 - disturbance of ecosystems and loss of biological diversity;*
 - pollution and degradation of the environment;*
 - disturbance of landscapes and sites that constitute the nation’s cultural heritage, and*
 - waste*

Where these things cannot be avoided altogether, they must be minimised and remedied;
- *Sustainable development also requires the application of a risk-averse and cautious approach which takes into account the limits of current knowledge about the consequences of decisions and actions (precautionary principle); and*

- *Sustainable development further requires that negative impacts on the environment and on people's environmental rights be anticipated and prevented and where they cannot be altogether prevented, are minimised and remedied (preventative principle).*

The “*Preventative Principle*” outlined above is aimed at minimising negative environmental impacts by providing that such impacts be anticipated before commencement of the activity (Paschke and Glazewski, 2006:13). Similarly, the internationally known “*Precautionary Principle*” presents an “*if in doubt, stay out*” approach in situations where there is uncertainty as to the potential environmental impacts of an activity (Paschke and Glazewski, 2006:13).

2.7 THE POLLUTER PAYS PRINCIPLE

One of the environmental management principles under Chapter 1 of NEMA is known as the “*Polluter Pays Principle*”.

Section 2(4) (p) of NEMA, states that:

The costs of remedying pollution, environmental degradation and consequent health effects must be paid for by those responsible for harming the environment.

The “*Polluter Pays Principle*” requires that the cost of pollution on society and the environment be borne by the polluter. The “*Polluter Pays Principle*”, having been included in the Rio Declaration, is an important component of environmental law (Nabileyo, 2009:9). Another, more controversial part of NEMA is s 24G, which will be discussed in **Chapter 3**.

2.8 SUMMARY

The idea of sustainable development was developed in response to a number of environmental issues being brought to the attention of society during the 1980's (Gerber, 2012:14). NEMA, specifically the EIA process, is designed to help South Africa strive for sustainable development (Gerber, 2012:14). NEMA contains a number of environmental management principles, including the “*Precautionary Principle*”, the “*Preventative Principle*” and the “*Polluter Pays Principle*”, amongst others (Van der Linde, 2009:201). These principles guide authorities in making environmentally responsible decisions. Over the last 40 years, the EIA has changed from a voluntary, *ad hoc* process to a legal requirement (Kidd and Retief, 2009:971). The basic foundation of environmental assessment is its anticipatory nature, and it

aims to ensure that environmental impacts are understood before development is approved and includes plans to mitigate these impacts (Paschke and Glazewski, 2006:1).

CHAPTER 3

***EX POST FACTO* ENVIRONMENTAL AUTHORISATION UNDER NEMA**

3.1 INTRODUCTION

Section 24F of NEMA, entitled “*Offences relating to commencement or continuation of listed activity*,” states that no person may commence with a listed activity without environmental authorisation from the competent authority. Section 24F outlines the punishment for convicted offenders to be a fine of R1 million or less¹, or imprisonment for up to ten years, or both a fine and imprisonment.

NEMA s 24G (*Consequences of unlawful commencement of activity*) is a controversial component of South Africa’s environmental framework legislation, which allows for *ex post facto* environmental authorisation. S 24G was originally used during the transition from the Environment Conservation Act (ECA) of 1989 to NEMA, allowing individuals whose activities were not authorised under the new law a window period to apply for approval under the new regulations and therefore remain lawful (Du Plessis, 2006; Gosling, 2013). However, s 24G has since been amended to become a part of the legislation (Gosling, 2013).

3.2 STEPS OF A S 24G APPLICATION

S 24G enables an individual or company who commenced with a listed activity without authorisation to avoid prosecution by applying to the Minister or MEC for *ex post facto* environmental authorisation (Paschke and Glazewski, 2006:23). The general steps of a s 24G application are as follows (under NEMA 2010 Regulations) (Paschke and Glazewski, 2006:23):

- The guilty individual seeking retrospective environmental authorisation applies to the Minister or MEC for a directive requiring the applicant to compile an EIA report containing certain information.

¹ Increased to R5 million as per the National Environmental Management Laws Second Amendment, 2013 of 18 December 2013.

- The applicant may be required by the Minister or MEC to submit additional information or conduct additional studies as necessary.
- An administrative fee is determined by the competent authority
- After the applicant pays the administrative fine, the Minister or MEC reviews the applicant's report and then either:
 - orders the activity to be discontinued, and requires environmental rehabilitation to take place within a specific time period
 - grants an environmental authorisation which is normally subject to certain conditions

S 24G applications can arise from authorities detecting non-compliance, applicants coming forward themselves, or from complaints by neighbours or other interested and affected parties (September, 2012:7). Regardless, applying for *ex post facto* environmental authorisation is voluntary, and authorities may not force offenders to apply. However, at any time enforcement action can be taken against environmental offenders (September, 2012:8).

3.3 UNCLEAR PURPOSE AND EFFECTS OF S 24G

The purpose of s 24G in NEMA is unclear. One purpose of the process is to stop unlawful and environmentally destructive activities, and restore compliance with the law, in an attempt to mitigate environmental impacts and provide the necessary approvals to continue with the activity (September, 2012:5). However, by requiring an administrative fee, s 24G seems to sanction non-compliance with environmental law, and the uncertainty over s 24G conveys a confusing message to both authorities and applicants (September, 2012:8).

According to September (2012:8), the ambiguity around s 24G contributes to inconsistency in the treatment of applications by authorities. Some provinces, or some individual authorities, may be stricter towards applicants, while others may be more relaxed and in effect allow environmental crime (September, 2012:8). As a result, argues September (2012:8), potential offenders may view the s 24G process as a low risk, high reward route to environmental authorisation, which is unfortunately the current perception. Van der Linde (2009:207) argues that s 24G: “*has proven to be controversial and frustrating in its scope, its application and its operating to both applicants and decision-makers alike.*” September (2012:8) emphasises the belief that, in a country such as South Africa facing abundant non-compliance with

environmental legislation, clear and definitive environmental law and enforcement is imperative.

3.4 CRITICISM OF S 24G RETROSPECTIVE ENVIRONMENTAL AUTHORISATION

Yolan Friedmann of the Endangered Wildlife Trust states the problem with s 24G very accurately: “*The environmental legislation in this country must be the only case of ‘ignorance of the law is not only a good excuse but allows you to be forgiven with the right paperwork...’*”

Yolan Friedmann, Endangered Wildlife Trust, in CER (2011).

The provision for *ex post facto* environmental authorisation provided for in NEMA s 24G has been criticised by a number of organisations as well as individuals. In fact, the Centre for Environmental Rights (CER), a non-profit organisation founded in 2009 by eight notable civil society organisations (CSOs) in the environmental and environmental justice fields, submitted a letter to the DEA, stating that: “*the application of the rectification mechanism in s 24G has had unfortunate unintended consequences for environmental management, and it has been a thorn in the flesh of civil society organisations for some years*” (CER, 2011). The main arguments and criticisms against s 24G are discussed below.

S 24G undermines NEMA

Allowing *ex post facto* environmental authorisation undermines the principles outlined in section 2 of NEMA, especially the “*Preventative*” and “*Precautionary Principles*”, which are aimed at encouraging sustainable development. In addition, one goal of integrated environmental management as described in NEMA is to make certain that the impacts of activities on the environment are thoroughly considered before the activity commences. As *ex post facto* environmental authorisation so clearly contradicts principles and purposes of NEMA, such authorisation should only be allowed under exceptional circumstances, and should be prevented from becoming the norm (Paschke and Glazewski, 2006:24).

NEMA emphasises the importance of public participation in making the EIA process inclusive and transparent, however, in September’s (2012:62) opinion, the s 24G process is inadequate in this regard. The traditional EIA process under NEMA also requires the consideration of

alternatives, which is clearly lacking in the s 24G process (September, 2012:62). Van Der Linde (2009) also argued against s 24G from an environmental management point of view, stating that s 24G can potentially undermine the entire aim of environmental impact assessment, integrated environmental management, and sustainable development. In the end, the right to environmental protection as stated in the constitution can be undermined (Van der Linde, 2009). September (2012:2) found that: “...S24G provisions have been abused in an attempt to circumvent the prescribed EIA process and may have thereby effectively provided an escape route for criminals, thus suggesting that blatant disregard of the law and the environment may be tolerated...”

Section 24G seems to undermine the foundation of environmental assessment, integrated environmental management, and sustainable development as described in NEMA (Van der Linde, 2009:207). The judge in the *Silvermine Valley Coalition v Sybrand van der Spuy Boerdery and Others* case described retrospective EIAs as holding: “no legal significance in terms of the legislative structure in which the EIA is located.”

Authorities have little reason to reject s 24G applications

Generally, the competent authority reviewing an application for *ex post facto* environmental authorisation would have little reason to reject the application. Even if the activity had a significant negative impact on the environment, the harm had already been done, and therefore there is little reason to reject the application (Paschke and Glazewski, 2006:24).

Companies and individuals may budget for the administrative fine

Retrospective environmental authorisation in NEMA presents individuals considering the undertaking of a listed activity with two options: either they follow the legal route and apply for environmental authorisation before undertaking the activity, or, if they perceive the benefits to outweigh the costs, they can commence with the activity and seek environmental authorisation at a later date (Paschke and Glazewski, 2006:24). The CER (2011) has noted the misuse of the s 24G process when companies simply budget for the s 24G administrative fine and proceed with illegal commencement of a listed activity.

Repeat and purposeful offenders treated the same as ignorant and first time offenders

S24G has been criticised by the CER (2011) as making inadequate provision to react to differing levels of fault. Purposeful as well as repeat offenders may get away easily, while oblivious and first-time offenders may face the stigma of a criminal record resulting from a contravention of s 24 F (CER, 2011).

Misuse of emergency situation clause

Companies or individuals may claim an emergency situation in order to avoid criminal prosecution, and then file a s 24G application (CER, 2011). A newspaper article written by Melanie Gosling in the *Cape Times* recently exposed an example of the misuse of the emergency situation clause of s 24G along the famous Garden Route of South Africa. Local environmental groups became aware of a property owner along the Keurbooms River who was undertaking bank stabilisation activities. When these environmental groups reported the activities to the Western Cape DEA&DP, they were informed that the property owner had been issued with a directive to undertake bank stabilisation in order to prevent a small stand of protected Milkwood trees from falling into the river (emergency situation).

The environmental groups noted that the property owner had then misused the authorisation to undertake various other activities, such as dredging in an estuary. Alarming, while the Milkwood stand only required about 50m of bank stabilisation, up to 400m of work had been done along the river, including work in an adjacent protected forest and wetland. The area of land under consideration is an extremely sensitive and important ecological corridor, and was recently discovered to be hosting the mangrove snail, which was previously believed to only occur north of the Bushmans River. Although environmental groups attempted to appeal the directive issued by DEA&DP, they were unsuccessful as there is no legal consideration given for appealing directives (Gosling, 2015).

When questioned, DEA&DP stated that the property owner had applied to the department for authorisation to stabilise the riverbank, but began with stabilisation activities before authorisation was granted. The property owner was ordered by the department to cease activities, but was allowed to employ “*temporary protection measures*” to prevent the Milkwood trees from washing away. According to DEA&DP, such work was undertaken in

accordance with the directive, and no further activities were to be undertaken. The property owner has since applied for s 24G retrospective authorisation, which is still being considered (Gosling, 2015).

The environmental groups involved in opposing the property owner's activities believe that s 24G is a significant loophole enabling landowners to act illegally and then apply to legalise their criminal activities, and that the s 24G process is being misused, leading to the authorisation of environmental damaging actions (Gosling, 2015).

Damaging misconceptions surrounding s 24G

Damaging perceptions exist regarding s 24G, including that s 24G is a route to guaranteed authorisation, and authorities are unlikely to pursue convictions for s 24F contraventions if the offender submits a s 24G application. Interestingly, in a 2013 submission to the Chairperson of the Standing Committee on Agriculture and Environmental Planning in the Western Cape Provincial Parliament, the CER argues that since payment of the s 24G administrative fine always precedes the authority's decision as to whether or not to allow environmental authorisation, authorities may feel obligated to authorise all s 24G applications (CER, 2013). The CER (2011) strongly argues that the administrative fines associated with s 24G are too low to represent an effective disincentive for contravening environmental law. These fines can further be reduced by an appeal, and corruption concerns have been raised as the calculation of fines is not transparent (CER, 2011).

3.5 THE ROLE OF THE S 24G ADMINISTRATIVE FEE IN DETERRING NON-COMPLIANCE

"It is about money. If the fine is less than the money lost due to a later start or no start at all, then the practice will continue."

Koos Pretorius, Federation for a Sustainable Environment (CER, 2011).

"I question the need for a s 24G application in its current form- to my mind, something done without permission should constitute a serious offence, and the penalty should be sufficiently onerous to act as a major deterrent."

Susie Brownlie, EAP and member of the CER's expert panel (CER, 2011).

Various authors have argued that the administrative fine associated with s 24G applications is not a sufficient disincentive to prevent individuals from pursuing the retrospective environmental authorisation option (Paschke and Glazewski, 2006; CER, 2011; September, 2012). However, the increase of the maximum fine to R5 million: “*would suggest that legislators intend to exploit and increase the punitive potential of S24G administrative fines*” (September, 2012:53).

According to Kidd (2013:395), the R5 million administrative fine under s 24G is likely to support the perception that s 24G is a punitive measure (and therefore a substitute for prosecution). Instead, s 24G should be a provision which addresses the failure to assess the environmental effects of the unlawful activity. In Kidd’s (2013:395) opinion, the administrative fine should be an “*inconvenience fee*”, and if the unlawful activity deserves a large punitive measure, criminal proceedings should follow. Interestingly, Kidd (2013:395) believes that severe administrative fees such as the fee provided for by s 24G, allow a great scope for abuse.

Although the authorities interviewed by September (2012:53) believed the fines issued in most s 24G applications to be sufficient to prevent further non-compliances, other concerned individuals and organisations disagree (CER, 2011). In fact, repeat offenders of s 24G seem to confirm that the administrative fee is too low to deter non-compliance (September, 2012:53).

As Koos Pretorius states above, the fines issued in terms of s 24G may be a relatively low price to pay when compared to the expensive delays potentially faced by developers/businesses during the environmental assessment process. Developers/businesses are even more likely to pursue the s 24G option when there is a possibility that environmental authorisation will not be granted through the traditional EIA process (Paschke and Glazewski, 2006:26). The competent authority will then be faced with a *fait accompli*, and have little choice but to allow authorisation, and unfortunately, such a situation normally occurs where the damage caused to the environment by the development is irreparable, even with rehabilitation (September, 2012:55).

If the financial benefits of proceeding with the development before obtaining environmental authorisation outweigh the cost of the s 24G application, the individual/company may simply budget for the maximum fine of R5 million and proceed with development, which essentially renders environmental assessment ineffective (Paschke and Glazewski, 2006:26). Such abuse of s 24G is challenging to address, as the optimal fine amount must be calculated to ensure successful deterrence, and there is no specific formula for this calculation.

When calculating the optimal fine amount, financial benefits gained by contravening the law must also be taken into consideration. If offenders are not adequately punished for economic benefits gained by environmental offences, a perception may be created that s 24G is a cost-effective method of obtaining environmental authorisation (September, 2012:53). This perception is in fact supported by September (2012:55), who reasons that the approval rate for s 24G applications is similar to the approval rate for EIA applications (approximately 97%), and may even be higher. Economic benefits, as well as time saving benefits of following the s 24G route, cause law-abiding individuals and companies to be disadvantaged in relation to offenders (September, 2012:53).

The s 24G administrative fine faces numerous additional difficulties. Offenders are allowed to appeal the amount of the fine, and are often successful in decreasing the amount. The method used to calculate fines for each applicant is not transparent, which raises the issue of possible corruption. Also, the fine administered does not take into consideration repeat offenders or ignorant violators (September, 2012:53).

3.6 THE CONNECTION BETWEEN ENVIRONMENTAL COMPLIANCE, SUSTAINABLE DEVELOPMENT, AND S 24G

The EIA process in South Africa is a tool for the promotion of sustainable development, which is described in Section 2.2. The EIA process relies on effective and consistent compliance from those undertaking environmental activities. By providing a solution for those who have undertaken environmental activities which may not otherwise have been authorised, s 24 G is not upholding or encouraging environmental compliance or the legitimacy of the EIA process. In offering a way around the EIA process for potentially damaging environmental activities, s

24 G is inhibiting the use of the EIA process as an effective implementation tool for sustainable development in South Africa.

3.7 S 24G IN OTHER COUNTRIES

Similar legislation to NEMA s 24G is found in other countries, and it is just as controversial. In India, the Director of the Union Ministry of Environment and Forests issued an office memorandum allowing developments which have made significant construction progress to be granted environmental clearance by an expert committee despite not having obtained the necessary approvals prior to construction. However, a petition was launched by the National Green Tribunal of India arguing that the memorandum violated India's Environmental Protection Act, Environmental Impact policies, constitution, and international obligations such as the Rio Declaration. The petition argued that projects which commenced without the required environmental approvals must be fined, and that *ex post facto* authorisation undermined the entire purpose of laws aiming to protect the environment (Press Trust of India, 2013).

In 2010, the government of Papua New Guinea amended their Environment Act to prevent third parties from legally challenging pollution permits granted by the government to encourage resource projects. This amendment gave the government of Papua New Guinea the power to authorise certain environmental activities associated with development, including retrospective authorisation. The Director of Environment's decision to grant authorisation is final and may not be challenged by the courts. The Director of Environment also has the power to issue exemption certificates for instances of non-compliance with environmental law. The amendments to the environmental law in Papua New Guinea are highly controversial and the government has been accused of amending laws due to political underpinnings (Cole, 2010).

3.8 CONSTITUTIONALITY OF S 24G CHALLENGED

Some argue that s 24G contradicts other sections of NEMA (Paschke and Glazewski, 2006:24), while others question the constitutionality of such a provision (Van Der Linde, 2009). Van der Linde (2009) has suggested that s 24G is unconstitutional as it disagrees with the principles of the rule of law and administrative legality, which states that a lawful activity

may not follow from an unlawful activity. The current court case *Lezmin 3039 CC and another v the Minister of Environmental Affairs and Others* challenges the constitutionality of s 24G based on the seemingly arbitrary way in which administrative fines are issued by officials. The plaintiff is an owner of a company in South Africa that was issued with a directive by the Department of Economic Development, Tourism and Environmental Affairs of the Free State after failing to obtain environmental authorisation for the construction of buildings on state land. After filing a s 24G application, the plaintiff was issued with a R617 500 administration fine, which he is now challenging in court.

3.9 PAST AMENDMENTS TO S 24G

S 24G has been amended since it was first included in the environmental legislation in 1998. The most recent amendments to s 24G took place on 18 December 2013, with the National Environmental Management Laws Second Amendment, 2013. Notable amendments made to s 24G in this act include the specific mention of the applicability of s 24G to illegally commenced waste management activities subject to the Waste Act, and the increase of the administrative fine from R1 million to R5 million. In addition, this amendment increased the Minister's power to issue directives, such as immediately suspending unlawful activities until a decision has been made regarding the s 24G application. With regards to criminal prosecution, the amended act clearly states that submission of a s 24G application does not detract from an EMI's authority to pursue criminal charges against offenders of NEMA or any SEMA, and the Minister/MEC may defer issuing a decision on the s 24 application until criminal investigations are complete. Importantly, the amended act now allowed for listed activities to be undertaken without environmental authorisation during emergency situations. Emergency situations have been defined by the amended act as: "*unexpected, sudden, and uncontrolled release...that causes, has caused or may cause significant harm to the environment, human life or property.*"

According to the Memorandum on the Objects of the National Environmental Management Laws Amendment Bill, 2012 (Republic of South Africa, 2012), the above mentioned amendments to s 24G were made to address the following:

- Inquiries were made to the DEA regarding the relevance of s 24G to unlawful waste management activities under the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (Waste Act, or NEM:WA). Thus, the amended s 24G provides clarity regarding waste activities.
- Having noticed the trend of companies budgeting for the s 24G administrative fine and illegally commencing with activities, the DEA wished to deter such practices by increasing the administrative fine.
- The DEA was asked by the Department of Cooperative Affairs to make provision for persons undertaking listed activities in response to emergency situations to be exempt from paying the administrative fine. Previously, the act did not permit the authorities to consider a s 24G application before the administrative fine was paid.

3.10 SUMMARY

NEMA s 24G is a controversial component of South Africa's environmental framework legislation, which allows for *ex post facto* environmental authorisation. By requiring an administrative fee, s 24G seems to sanction non-compliance with environmental law, and the uncertainty over s 24G conveys a confusing message to both authorities and applicants. NEMA s 24G has been criticised by a number of organisations as well as individuals. Criticisms of s 24G include that it undermines the environmental management principles NEMA, especially the "*Preventative*" and "*Precautionary Principles*", which are aimed at encouraging sustainable development. Another criticism of s 24G is that authorities have little reason to reject the application, as the harm to the environment had already been done. Opponents of s 24G have argued that the administrative fine associated with s 24G applications is not a sufficient disincentive to prevent individuals from pursuing the retrospective environmental authorisation option. Some authors have even questioned the constitutionality of s 24G.

CHAPTER 4

WESTERN CAPE CASE STUDY

4.1 INTRODUCTION

The research design type of this study is evaluative research, as the effectiveness of s 24G in deterring non-compliance with environmental law is examined. This research combines quantitative and qualitative research, and the quantitative component of the research consists of statistical information obtained from the Western Cape Department of Environmental Affairs and Development Planning (DEA&DP).

4.2 THE WESTERN CAPE AS A CASE STUDY

During the early stages of research planning and drafting of the initial research proposal, the intention was for the data analysis to include s 24G applications throughout the entire South Africa. However, due to time constraints of data collection from every provincial department, it was decided to focus the research on the Western Cape Province.

The Western Cape Province is an appropriate case study for the following reasons:

- The Western Cape hosts the fynbos vegetation type, which is not found anywhere else on earth. Fynbos is characterised by plants with small, fine leaves which allow them to survive the dry, hot summers in the Western Cape. Fynbos vegetation is unique as a majority of plant species occurring in fynbos, as well as a few animal species, are endemic (Manning, 2007). The presence of fynbos in the Western Cape makes effective environmental management in this region all the more important.
- The Western Cape is home to Table Mountain, the Stellenbosch Winelands, Cape Point, and numerous other tourist attractions. As such, the province attracts many visitors, and it is important for the natural beauty, resources and heritage of this region to be conserved.
- DEA&DP has a specific “Section 24G Applications” Sub-directorate under the Environmental Governance directorate for processing s 24G applications.

- According to the 2013/2014 NECER, DEA&DP had recorded the second highest total s 24G fines paid during that time period (R 3 495 975), behind DEA, which recorded R5 931 000 (DEA, 2014:3).
- Of all the provinces, DEADP recorded the greatest number (173 in total) of administrative enforcement notices in the year 2013/2014. These enforcement notices comprised of 113 pre-compliance notices, 21 final compliance notices, 29 pre-directives and 10 directives. (DEA, 2014)

For the purposes of this study, only s 24G applications for activities listed in the NEMA EIA regulations were examined. S 24G applications relating to ECA listed activities were not included in this study.

4.3 DATA COLLECTION PROCESS

An official from the “Section 24G Applications” Sub-directorate within DEA&DP was contacted directly to supply the required information. However, the official required that a Promotion of Access to Information (PAIA) request be submitted under the Promotion of Access to Information Act, (Act 2 of 2000) (Republic of South Africa, 2000). A PAIA application was submitted to the Information Officer of the DEA&DP on 9 July 2015. The required R35 application fee was paid on 20 July 2015, and the requested information was received via email on 20 August 2015. The information was neatly organised in a table on Microsoft Excel. It is assumed that the statistical data provided by DEA&DP is reliable and accurate.

4.4 ADVANTAGES AND DISADVANTAGES OF USING SECONDARY DATA

This study only made use of secondary data, i.e. data collected by others. The advantages of using secondary data in this research include saving time (no interviews undertaken, data already organised), money (no resources used in collecting data), and having access to a greater breadth of data that could not have been collected during one study. However, there were disadvantages to using secondary data in this study. These disadvantages include no data collected on certain aspects of s 24G applications, notably, the number of environmental authorisations refused. Another disadvantage was that the data collected by the DEA&DP

regarding the various industries in which s 24G applications were filed was very general, and therefore not very helpful in the analysis of the research question.

4.5 STATISTICAL INFORMATION

Statistical information was included in the research in order to identify and describe trends concerning s 24G applications in the Western Cape. Data was obtained from the Sub-directorate “Section 24G Applications” of DEA&DP. DEA&DP provided information on s 24G records from 2006-2014.

The information provided by DEA&DP consisted of the following:

- Number of s 24G applications received
- Environmental Authorisations issued and refused
- Sector (individual/private, company, trust, state department/municipality)
- Listed activities involved
- Number of administrative fines paid
- Amount paid in administrative fines
- Average amount per administrative fine paid

4.6 STATISTICAL ANALYSIS

In order to present the statistics obtained from DEA&DP in a clear format, graphs were compiled using Microsoft Excel. Both line and pie graphs were used to show trends and patterns observed over the time periods included in this study.

4.7 S 24 G APPLICATIONS RECEIVED

A total of 347 s 24 G applications were received by DEA&DP between 2006 and 2014. Of these 347, 230 were granted an Environmental Authorisation, representing 66% of applications. The remaining 34% of applications were either withdrawn, or a directive was issued by the Department.

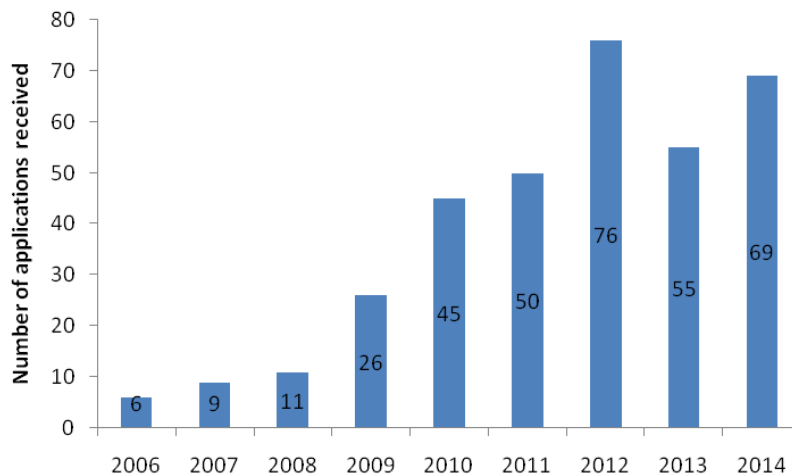


Figure 4.1: The number of s 24G application received by DEA&DP between 2006 and 2014 for listed activities under NEMA.

According to **Figure 4.1**, between 2006 and 2014, there has been a general increasing trend in the number of s 24G applications received by DEA&DP, from merely 6 applications in 2006, to 69 in 2014 (a 1050% increase). Looking at percentage change, the largest increases in applications were seen between 2008-2009 (136% increase) and 2009-2010 (73% increase). A 52% increase was seen between 2011-2012, while 2012-2013 saw a 38% decrease in the number of applications, the only decrease seen between 2006 and 2014.

4.8 SECTORS INVOLVED IN S 24G APPLICATIONS

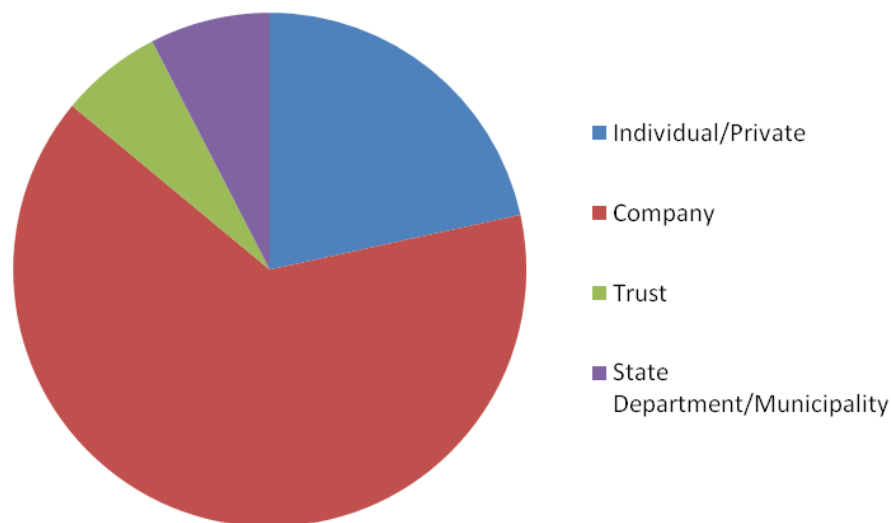


Figure 4.2: Number of s 24G applications between 2006 and 2014 originating from various sectors.

Data received from DEA&DP's records indicates that of the 347 s 24G applications received by DEA&DP between 2006 and 2014, a majority (221 applications, or 64%) were filed by companies. Individuals/private accounted for 74 applications, or 21%, with State Departments/Municipalities accounting for 26, or 8% of applications. The lowest number of s 24G applications was filed by trusts (22 applications, or 6%) (**Figure 4.2**).

4.9 MOST PREVALENT ILLEGAL ACTIVITIES

According to DEA&DP's records, most s 24G applications resulted from the following activities:

- Activities within 100m of the high water mark
- Activities within 32m of a watercourse
- Infilling and/or removal within a watercourse
- Removal of vegetation
- Waste related activities (treatment, storage, disposal of waste)
- Agriculture (concentration of livestock, chicken farming)
- Telecommunication (cellphone masts, antennas, etc.)

4.10 S 24G ADMINISTRATIVE FINES

Since 2006, DEA&DP has received more than R8 000 000 in s 24G administrative fines.

Table 4.1 below shows the s 24G administrative fines paid in the Western Cape since 2006.

Table 4.1: The Number of s 24G administrative fines paid, amounts paid, and average fine between 2006 and 2014.

	Number of administrative fines paid	Amount paid in administrative fines	Average amount per S24G administrative fine paid
2006	1	R 7 500	R 7 500
2007	8	R 90 495	R11 312
2008	8	R342 900	R42 863
2009	20	R300 850	R15 043
2010	1	R10 000	R10 000
2011	9	R351 000	R39 000
2012	33	R1 382 250	R41 886
2013	65	R3 385 400	R52 083
2014	50	R2 788 450	R55 769
Total	195	R8 658 845	R275 456

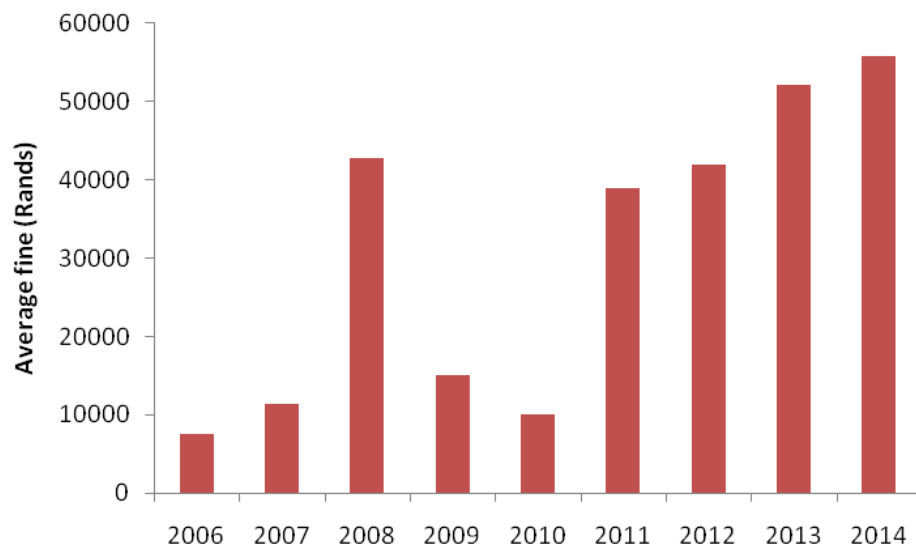


Figure 4.3: Average amounts of s 24G administrative fines between 2006 and 2014.

As is evident by **Table 4.1** and **Figure 4.3** above, the average administrative fine has increased greatly from R7500 in 2006, to R55 769 in 2014, which represents a 644% increase. A large increase in the average fine was observed in 2008, after which the average fine dropped, increasing again in 2011.

Most of the results obtained from DEA&DP's records correlate with the results obtained by September (2012) from GDARD, although September only collected data for the years between 2006 and 2010. Between 2006 and 2010, GDARD received 195 applications, while DEA&DP only received 97 applications during the same time period. In terms of number of applications received per year, a similar result was seen as GDARD only received 1 s 24G application in 2006. September (2012:41) notes that the low number of applications in 2006 could be because the first EIA Regulations were promulgated in the middle of that year. However, GDARD saw a large number of applications being filed in 2008, which September (2012:41) ascribed as being due to increased knowledge of the new legislation. September (2012:41) saw a possible decreasing trend in the amount of s 24G applications between 2006 and 2010, although she admitted that not enough data was available at the time to come to such conclusions.

In terms of sectors involved in s 24G applications, the results obtained from DEA&DP are very similar to September's (2012) results obtained from GDARD. September (2012) also found that a majority of s 24G applications came from companies, followed by individuals and the public sector (both 7%), with the lowest number of applications originating from trusts. With regards to type of activity, September (2012) found a fairly even distribution between different activities applied for, with no "*typical*" s 24G activity noted. The results obtained from DEA&DP suggest similar findings, with a wide variety of activities applied for from a wide variety of industries.

Regarding the average amounts of s 24G fines, the results obtained from DEA&DP are difficult to compare with September's (2012) results obtained from GDARD, as September only collected information between 2006-2010. However, September's (2012) results show no pattern in the average amounts per fine, whereas the results from DEA&DP show an increasing trend between 2006 and 2014.

4.11 ANALYSIS

Although time constraints for this study made interviews with officials from DEA&DP unfeasible, September (2012) conducted interviews with officials from GDARD in order to assist with the interpretation of the statistical information surrounding s 24G. Much of the information revealed through these interviews is applicable to s 24G applications throughout the country. This information will be discussed further below, and applied to the information gathered from DEA&DP's records.

Unfortunately, the information provided by DEA&DP offers no clarity regarding negative records of decision (i.e. environmental authorisation refused). September (2012) also received no conclusive data from GDARD relating to the number of environmental authorisations refused, however, she states that it can rationally be assumed that the approval rate for s 24G applications is similar to the approval rate for traditional EIA applications (September, 2012:55). However, September (2012:56) admits that the high approval rate does not take into consideration the partial authorisation of activities, which may be reduced to a point where they are no longer viable. September (2012:56) also notes that

environmental authorisations may require certain structures to be demolished (often when structures are within 32m of a watercourse).

Officials interviewed by September (2012:41) stated that a majority of s 24G applications received by GDARD arise from non-compliance detected by enforcement officials (such as EMIs) in response to public complaints or during routine inspections. A small number of offenders may come forward themselves after becoming aware of the unlawfulness of their activity. Offenders may become aware of the unlawfulness of their activities when they sell their property, or when they request municipal services (September, 2012:42).

According to the officials interviewed by September (2012), more than 90% of s 24G applications are due to ignorance of the environmental law, or sometimes, negligence. The officials consider a small number of applications to arise from intentional offences. Although it is challenging to determine the exact extent of intentional offences, September (2012:42) considers the above estimates of the officials to be reasonably accurate due to their experience and knowledge of non-compliance activities.

The results obtained from DEA&DP reveal that a majority of s 24G applicants are companies. This could be due to pressure experienced by companies to save time and money. In situations where undertaking a traditional EIA process could result in profit losses, companies may be more likely to undertake a listed activity illegally (September, 2012:42). The large size of some companies may cause difficulty in controlling and regulating environmental activities, leading to non-compliance due to negligence. On the other hand, smaller companies may have fewer resources available to stay informed of changes in environmental legislation and regulations (September, 2012:42).

September (2012:42) attributed the s 24G offences originating from State Departments and Municipalities to crucial service delivery, for example, service provision to a new informal settlement. September (2012:42) specifically cites an example of a municipality that had to urgently install a pipeline to provide a local community with drinking water, and did not have time to wait for the required environmental approvals. However, since September's (2012)

research, NEMA s 24F has been amended to make provision for emergencies such as the aforementioned situation.

The results obtained from DEA&DP reveal that although the average administrative fine has increased consistently since 2006, the number of s 24G applications received has also increased consistently. This trend would appear to suggest that s 24G, in particular the administrative fine associated with s 24G, is not an effective deterrent to prevent non-compliance with environmental law. However, this conclusion makes the assumption that the number of s 24G applications received is an accurate reflection of the number of environmental non-compliances being committed. It could be argued that the number of environmental non-compliances in the time period considered in this study remained the same, but that improved enforcement of environmental law led to improved detection of non-compliance.

The results from the most recent NECER (discussed in **Chapter 6**) show an increase in the number of reported environmental incidents, the number of EMIs, the number of complaints from the Environmental Crimes and Incidents Hotline, and the number of facilities inspected. Also, DEA&DP rank third in terms of the number of non-compliances detected, behind the DEA and the KwaZulu-Natal Department of Agriculture and Environmental Affairs (DAEA). Therefore, detection of environmental non-compliance certainly has improved, and could explain the consistent increase in the number of s 24G applications received by DEA&DP.

Although it cannot reasonably be concluded from the above results that s 24G is an ineffective deterrent to environmental non-compliance, s 24G has numerous challenges and pitfalls which must be addressed in order to prevent its misuse and abuse by the regulated community. The downsides of s 24G are discussed in **Chapter 2**, and the following **Chapter 5** will discuss possible remedies for these downsides.

4.12 SUMMARY

The Western Cape was used as a case study for this research due to the presence of fynbos vegetation and the Western Cape's value as a tourist destination. In addition, the Western

Cape DEA&DP has a dedicated Sub-directorate for processing s 24G applications, and according to the 2013/2014 NECER, the DEA&DP had recorded the second highest total s 24G fines paid during that time period. Statistical information from DEA&DP was included in the research in order to identify and describe trends concerning s 24G applications. The results reveal that a majority of s 24G applicants are companies, and this could be due to pressure experienced by companies to save time and money.

In situations where undertaking a traditional EIA process could result in profit losses, companies may be more likely to undertake a listed activity illegally (September, 2012:42). The results also reveal that although the average administrative fine has increased consistently since 2006, the number of s 24G applications received has also increased consistently. This trend would appear to suggest that the administrative fine associated with s 24G is not an effective deterrent to prevent non-compliance with environmental law. However, this conclusion makes the assumption that the number of s 24G applications received is an accurate reflection of the number of environmental non-compliances being committed.

CHAPTER 5

RECOMMENDATIONS FOR IMPROVING THE EFFECTIVENESS OF S 24G AS A DETERRENT FOR CONTRAVENING ENVIRONMENTAL LAW

5.1 INTRODUCTION

Various measures have been suggested by different stakeholders to remove the unintended consequences of s 24G and to prevent s 24G from being used by dishonest individuals and businesses as a loophole to avoid the EIA process. These recommendations and suggestions will be discussed, analysed and expanded on below.

5.2 THE CENTRE FOR ENVIRONMENTAL RIGHTS' RECOMMENDATIONS

The CER (2011) suggested numerous legislative amendments to both s 24F and s 24G, which are described and explained below.

24F Offences relating to commencement or continuation of listed activity

(4) A person convicted of an offence in terms of subsection (2) is liable to:

(a) a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, if that person is a natural person; and

(b) A fine not exceeding the greater of 10% of the person's annual turnover in the Republic and its exports from the republic during the person's preceding financial year, or R10 million, if that person is not a natural person.

Note: these suggestions were made by the CER in 2011. Subsequently, the administrative fine under s 24G was raised to R5 million in 2013, as per the CER's suggestion (a) above.

According to the CER, the purpose of the proposed amendments above is to guarantee a criminal fee for larger companies that serve as an effective disincentive to contravening s 24F. The CER based the penalty formation on s 59 (2) of the Competition Act (Act 89 of 1998, Republic of South Africa) (CER, 2011).

(5) When determining the penalty, a court must have regard [for] all relevant factors, including the following:

- (a) the extent of the intention or negligence of the person who committed the offence in terms of s 24F (2)(a);*
- (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment;*
- (c) the degradation of the environment caused by the commission of the offence;*
- (d) the behaviour of the person who committed the offence;*
- (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence;*
- (f) the degree to which the person who committed the offence has cooperated with authorities;*
- (g) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act; and*
- (h) the amount of any administrative fine paid in terms of section 24G (3) (b)*

The CER (2011) intended the measures outlined above to guide courts in deciding on an appropriate penalty. These factors are based on various factors for deciding administrative fines described in s 59 (3) of the Competition Act, as well as the factors for criminal penalties described in s 52 of the National Environmental Management Act: Air Quality Act, 2004 (Republic of South Africa) (CER, 2011). Many of the prominent concerns regarding s 24G are addressed in the provisions above. Notably, repeat offenders are addressed in (g), and in the event of negligent offenders, the consideration of administrative fees already paid under s 24G (CER, 2011).

24G Additional consequences of unlawful commencement or continuation of listed activity

An important amendment suggested by the CER (2011) is removing the reference to “*rectification*” in the title of s 24G, in order to modify the perceptions regarding this legislation.

(1) A person who has committed an offence in terms of section 24F (2) (a) must immediately cease the commencement or continuation of the activity or activities that constituted the

offence and take reasonable measures to mitigate degradation of the environment caused by the commission of the offence and to prevent further degradation of the environment.

The above amendment obligates offenders to cease their activities and to apply measures to prevent environmental damage from worsening. The activity(ies) must be ceased until a decision has been made regarding the s 24G application (CER, 2011). The above provision was in part included in the 2013 amendment to s 24G, as the minister or MEC was given the right to order activities to cease pending the outcome of the s 24G application. However, the ceasing of activities is still not compulsory, as suggested above by the CER (2011).

(2) A person who has committed an offence in terms of section 24F (2) (a) and who is unable to show, on a balance of probabilities, that the offence was not committed intentionally, must, to the satisfaction of the competent authority or the Minister of Mineral Resources, as the case may be, rehabilitate all degradation of the environment caused by the commission of the offence, without the option of applying for an environmental authorization in terms of subsection (3).

The provision suggested above clearly does not allow those who intentionally commence listed activities without environmental authorisation from applying for s 24G rectification. Intentional offenders are ordered to stop activities and rehabilitate. Such a provision would prevent individuals and businesses from using s 24G as an alternative to the traditional EIA process (CER, 2011).

The suggestion made by the CER (2011) above clearly places the onus of proving innocence on the offender, who has to prove to authorities, on a balance of probabilities, that the offence was unintentional. Notably, repeat offenders would automatically be placed in this category, as having been caught for unintentional/negligent contravention previously, it would be nearly impossible to prove innocence a second time. Intentional offenders, according to the above suggestion, would not be apply to apply for rectification, and therefore no administrative fine would be payable. Instead, the offender would pay a criminal fine decided by a court.

(3) A person who has committed an offence in terms of section 24F (2) (a) and who, on a balance of probabilities, is able to show that the offence was not committed intentionally but is unable to show that the offence was not committed negligently, and who has-

(a) complied with subsection (1); and

(b) paid an administrative fine determined by the competent authority in terms of subsection (7) below- may be directed by the Minister, Minister of Mineral Resources or MEC concerned, as the case may be, either to:

(i) wholly or in part rehabilitate all degradation of the environment caused by the commission of the offence, without the option of applying for an environmental authorisation in accordance with subsection (5)

(ii) wholly or in part rehabilitate all degradation of the environment caused by the commission of the offence, and apply for an environmental authorisation in accordance with subsection (5); or

(iii) apply for an environmental authorisation in accordance with subsection (5).

The above suggested provision includes the current s 24G, but applies it only to those who have negligently commenced with a listed activity without permission. Negligent offenders include those who should have been aware of the requirement to apply for permission but did not do so, or those who had people working for them (e.g. subcontractors) who unlawfully commenced with activities. In negligent situations, offenders must cease activities, mitigate damage, and pay a fine before authorities decide whether the offender will be allowed to apply for rectification or not. Such a provision is significant as it allows authorities to only accept rectification applications for situations where authorisation could be allowed. In situations where authorisation would not have been allowed to begin with, the offender must cease and rehabilitate under (i) above. Such a provision allows authorities greater discretion when assessing specific situations (CER, 2011).

(4) Subsection (3) applies to a person who has committed an offence in terms of section 24F (2) (a) and who is able to show, on a balance of probabilities, that the offence was not

committed intentionally or negligently, except that such a person does not have to pay the administrative fine in subsection (3) (b).

This provision is similar to (3), but it applies to “*innocent*” offenders, and therefore does not require the payment of a fee. “*Innocent offenders*” in this case include those who did not know and could not reasonably have known that environmental permission was necessary. An example of such a person is an inhabitant of a rural village lacking access to legal information (CER, 2011).

(5) Where the Minister, Minister of Mineral Resources or MEC concerned, as the case may be, has directed a person to apply for an environmental authorisation in terms of this section, that person must:

(a) compile a report containing –

(i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;

(ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;

(iv) an environmental management programme; and

(b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

(6) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (5) and thereafter may-

(a) direct the person to rehabilitate all degradation of the environment caused by the commission of the offence in terms of section 24F(2) (a) within such time and subject to such conditions as the minister or MEC may deem necessary; or

(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

Note: only the underlined phrases in provisions (5) and (6) above were inserted by the CER. The remainder of the text represents s 24G as it currently reads. The above provisions have been amended by the CER to include all destruction of the environment caused by the unlawful activity, which is more specific than the generic “*rehabilitate the environment*” currently provided for by s 24G (CER, 2011).

(7) The administrative fine payable in terms of this section may not exceed R10 million and must be determined by the competent authority having regard to all relevant factors, including the following:

- (a) the extent of the intention or negligence of the person who committed the offence in terms of s 24F (2)(a);*
- (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment;*
- (c) the degradation of the environment caused by the commission of the offence;*
- (d) the behaviour of the person who committed the offence;*
- (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence;*
- (f) the degree to which the person who committed the offence has cooperated with authorities;*
- (g) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act; and*

In the amendments proposed in (7) above, the CER suggests a maximum administrative fine of R10 million. The factors listed above are based on factors for determining administrative fines described by s 59 (3) of the Competition Act as well as s 52 of the National Environmental Management: Air Quality Act, 2004 (Republic of South Africa, 2004). The lack of transparency involved in the determination of administrative fines remains a concern, and such information should be made publicly available (CER, 2011). The administrative fine under s 24G was subsequently raised to R5 million in 2013.

8. Except for a person mentioned in subsection (4), no application in terms of subsection (3) or any environmental authorisation issued in terms of subsection (6) (b) shall derogate from liability under section 24F(2).

This provision is suggested by the CER (2011) in order to ensure that intentional and negligent offenders do not avoid criminal proceedings. When negligent offenders are concerned, administrative fees paid must be considered when deciding on a criminal fee, whereas innocent offenders are exempt from being held criminally liable (CER, 2011).

5.3 STAKEHOLDER SUGGESTIONS AND RECOMMENDATIONS

In addition to the suggested amendments to the legislation above, the CER invited EAPs, lawyers, conservationists, environment forums, and other stakeholders to submit their comments on the function of s 24G. Many insightful comments were made by these stakeholders, which will be discussed below (refer to **Addendum B** for original comments).

Level of negligence, ignorance or willfulness

Susie Brownlie, EAP and member of the CER's expert panel, commented that different levels of transgressions should be identified. Ms Brownlie's comment is similar to the suggestion made by the CER above, whereby both intentional and genuinely unintentional activities are considered.

Mr Charl de Villiers, environmental consultant, also stated that offenders of s 24F should be given opportunity to defend their actions, and explain any mitigating circumstances which are of relevance. Mr de Villiers describes situations where farms are inherited, along with unsustainable land uses or farming practices. Such practices are continued as they have been for many generations, and the landowner may be oblivious that some of his/her practices are subject to environmental authorisation.

Andrew Muir of Austen Smith makes an interesting argument, noting that if provision is not made for genuinely accidental cases of contravening environmental law, then "*innocent*" offenders may be fearful of coming forward to the relevant authority. These offenders will then remain incompliant, and continue with potentially environmentally damaging unlawful

activities. If provision is made for “*innocent*” offenders, then such offenders can be brought back into compliance and be assisted with mitigating environmental damage stemming from their activities.

Special consideration for sensitive or protected areas

I&APs, such as Nicole Barlow of the Environment and Conservation Association (ECA), suggest that s 24G must provide for undertaking listed activities within sensitive areas, such as wetlands. Ms Barlow suggests that in cases of illegal commencement within sensitive areas, no application for rectification should be allowed, and instead, the offender must be ordered to immediately cease and rehabilitate. John Wesson, of the National Association of Conservancies of South Africa, also argues that illegal listed activities within protected areas should be considered equal to poaching in the level of punishment.

Emergency situations and public interest

Cara Stokes, a consultant at CSEnvironmental, states that a s 24G application should be allowed in cases responding to environmental emergencies, or in the public interest. For example, the upgrading of roads or sewage plants could be considered in the public interest and should be treated differently to cases of environmental neglect. However, Chrissie Cloete of the Plettenberg Bay Community Environment Forum notes that she has observed the misuse of so called “emergency” situations being used to carry out a host of other environmentally damaging activities.

Financial and criminal punishment under s 24G

Many CER stakeholders had comments regarding criminal prosecution of s 24G offenders and the controversial administrative fee. Mark Botha of the WWF argues that there should be a distinct difference between the criminal fine and the administrative fine, stating that in some cases an administrative fee may suffice as punishment, while in other cases a more stringent punishment may be required. However, Nicole Barlow comments that judges sentencing environmental offenders may not have adequate knowledge of the environmental consequences of the unlawful activities. Judith Taylor and Rachel Adatia of ELA state that offenders should be fined in proportion to the cost of the development, while Chris Galliers of

the Wildlife and Environment Society of South Africa (WESSA) argues that both short and long term financial benefits of non-compliance to companies be taken into consideration. Carolyn Schwegman of WESSA laments that fines are often reduced by 50% upon appeal by the applicant.

Greater transparency regarding the administrative fee

Charl de Villiers, as well as a few other stakeholders, emphasises the need for transparency in the calculation of the fee. The Hout Bay and Llandudno Environment Conservation Group comments that the administrative fine goes into the competent authority's coffers, while fines paid through criminal sanctions go into the National Revenue Fund to be included in the national government's budget. Thus, the competent authority may have an incentive to allow rectification as revenue is much needed by most government departments. The CER (2013) suggests that s24G administrative fines should be calculated by an independent tribunal.

Offenders register, external review panel and director/authority accountability

Many stakeholders, including the CER (2011) itself, also mentioned the idea of a register for offenders, to prevent repeat offenders from escaping detection. Nicole Barlow believes that directors of companies should be held accountable, and should be tracked to prevent offending directors from dissolving companies and starting new companies in order to leave no trace of their previous crimes.

Chris Galliers suggests an external review panel for s 24G applications, which may improve public participation in the s 24G process. An external review panel should also serve to decrease corruption and increase the accountability of competent authorities. Advocate Tsheko Ratsheko argues that Ministers and MECs must provide reasons for their decisions regarding s 24G applications.

5.4 IMPROVING THE EFFECTIVENESS OF THE CONTROVERSIAL ADMINISTRATIVE FINE AS A DETERRENT

September (2012:63) discusses the controversy surrounding the s 24G administrative fine, and notes that many stakeholders consider the fines to have great deterrence potential, while

others feel that the fines are not intended to be a punishment to begin with. Numerous options, some suggested by September (2012), are available to improve the effectiveness of the s 24G administrative fine as a deterrent.

Calculation of the administrative fee, and the ideal fine quantity

September (2012:63) notes that poor transparency in the calculation of the administrative fine is a major concern and may allow corruption (for example, offenders may bribe officials to lower their fine). In addition, unlike criminal penalties, money from s 24G fines is sent to the administering authority's coffers, offering a financial motivation to authorities issuing the fine (September, 2012:64). Macrory (2010:91) emphasises the potential danger of authorities perceiving administrative fines as a method of collecting revenue.

Increased transparency in the process of fine calculation will lower the risk of corruption, and prevent authorities from using the administrative fine to collect revenue (September, 2012:64). Improving transparency would also improve peoples' perceptions of the equity of the s 24G process, thus making the regulated community more likely to comply.

In September's (2012:64) thesis, she outlines the United States' Environmental Protection Agency's (EPA) Policy on Civil Penalties (1984). This policy demonstrates a multi-step process to determine the ideal fine amount:

1. Determine the "*preliminary deterrence amount*," which is derived from the economic gains factor (e.g. money saved due to lack of mitigation of environmental damage) and the gravity factor (e.g. damage done to environment, and the size of the company, assuming that an offence by a larger company is worse than an offence by a smaller company).
2. Include "*adjustment factors*" to determine the "*Initial Penalty Target Figure*". Adjustment factors include the perceived level of wilfulness or negligence, past records of non-compliance, and willing cooperation with authorities.
3. Adjust the "*Initial Penalty Target Figure*" to take into account the offender's capability of paying, or if changes are made to the adjustment factors used in calculating the "*Initial Penalty Target Figure*" due to new information coming to light.

Determining the level of negligence, ignorance or wilfulness

The degree of the individual or company's wilfulness, ignorance or negligence in committing the non-compliance is very difficult to determine. People are unlikely to be open and honest regarding their level of intent, and therefore an investigation will need to be undertaken by authorities, requiring large amounts of time (September, 2012:57). In addition, attempting to determine level of ignorance may lead to the questioning of authorities' objectivity and may even lead to allegations of corruption.

Determining the economic gains from non-compliance

The Organisation for Economic Co-operation and Development (OECD)(2009:88) found that most government authorities and non-government specialists believe that although financial penalties may stop unlawful activities, they are not large enough to outweigh the economic benefits gained from non-compliance, and therefore do not act as significant deterrents. The OECD (2009:88) observed a trend in governments linking financial penalties to financial benefits stemming from non-compliance.

September (2012:65) admits that determining the economic profits gained (both directly and indirectly) from a non-compliance is very challenging. Fourie (2009:25) states that: *"While EMIs and other enforcement officials work against the odds in this system to achieve modest and occasional fines, violators of environmental legislation (particularly non-compliant corporate entities) continue to enjoy substantial illegal financial gains at the expense of their compliant competitors, the environment and the people whose health, wellbeing and natural heritage depend on it."*

Economic benefits from unlawful environmental activities are difficult to calculate as benefits can be long term or short term, and often come in different forms. In most cases the authority issuing the s 24G administrative fine is not trained to determine the financial benefits accumulated due to non-compliance (September, 2012:65).

Although quantifying the economic benefits accrued from environmental non-compliance is extremely difficult, it is crucial to make efforts to quantify such benefits, as offending companies should not be allowed to reap financial benefits (higher profits or lower costs) from non-compliance. Dishonest companies should not be given an advantage over honest companies who spend time and money in order to remain compliant (September, 2012:65). The US EPA attempts to quantify the economic benefits arising from non-compliance through the use of economic models, which are described below.

Enforcement economic models

The US EPA has several economic models used to evaluate the economic aspects of enforcement actions. These economic models are as follows (adapted from OECD, 2009:89):

1. BEN: determines an offender's economic savings from postponing or entirely avoiding pollution control measures.
2. PROJECT: computes the actual cost to an offender of a proposed supplemental environmental scheme (and the ensuing reduced penalty).
3. ABEL: assesses a company's capacity to pay for compliance costs, remediation of damage, or penalties.
4. INDIPAY: estimates an individual's capacity to pay for compliance costs, remediation of damage, or penalties.
5. MUNIPAY: appraises a municipality's capacity to pay for compliance costs, remediation of damage, or penalties.

Although some of the abovementioned models are somewhat contentious, these models are a positive step in increasing the objectivity and transparency of fines (September, 2012:65). Interestingly, after the BEN Model was launched, fines increased significantly (Fourie, 2009).

Accurately reflecting the environmental impacts of non-compliance

In order for s 24G administrative fines to accurately reflect environmental damage caused by a particular activity, the economic value of a particular ecosystem, and thus the cost to society of the degradation of that ecosystem, must first be quantified. Quantifying the value of the environment and the various services it provides should also encourage people to comply with environmental law, as they will understand the value of the many ecological services that

could be destroyed by their actions (IBRD, 2005:2). However, in general, economic policies and markets do not accurately value biodiversity or the protection of environmental systems (IBRD, 2005). Efforts to encourage environmental protection are handicapped by a poor understanding of the economic value of ecosystems, and the cost of environmental degradation (IBRD, 2005).

The economic valuation of ecosystems

Ecosystems provide many services, including the filtering of air and water, pollination, nutrient cycling, carbon sequestration, and soil formation (IBRD, 2005:5). The Millenium Ecosystem Assessment (2003) divides ecosystem services into four distinct categories, namely: “*provisioning services*”, “*regulating services*”, “*cultural services*” and “*supporting services*” (IBRD, 2005:6). “*Provisioning services*” include foodstuff and water, “*regulating services*” include stormwater and disease control, “*cultural services*” include recreational and historical benefits, while “*supporting services*” sustain the conditions for life (eg. nutrient cycling) (IBRD, 2005:6). In spite of the crucial services they provide, global ecosystems are under immense pressure from direct and indirect effects of human development and expansion (IBRD, 2005:6).

The valuing of environmental services is complicated by the perspective of who is valuing the ecosystem. Benefits supplied by ecosystems are distributed differently amongst groups, and ecosystems which are highly valued by one group may cause losses to another group (IBRD, 2005:2). Benefits of ecosystems are distributed amongst local inhabitants, the people of the specific country, and the global community. The unequal distribution of costs and benefits of environmental actions has ethical ramifications, which need to be considered by studying the flow of these costs and benefits to different groups of people, especially indigenous peoples (IBRD, 2005:22).

Until fairly recently, most economists considered environmental costs and benefits to be impossible to quantify. However, great progress has been made in this regard, and many methods of valuing environmental costs and benefits have been developed (IBRD, 2005:27). The purpose of valuation of ecosystems is to produce objective, accurate information regarding the costs and benefits of protecting a certain system, in order to assist in decision making. Although the techniques used to value the environment are not without fault, they are

helpful in illustrating trade-offs and assisting in decision-making (IBRD, 2005:4). Economists generally value ecosystem services based on how they are utilised.

Ecosystem values are first divided into “*non-use values*” and “*use values*”. “*Use values*” are then further divided into “*direct use values*”, “*indirect use values*”, and “*option values*” (IBRD, 2005:9). “*Direct use values*” are ecosystem products and services which are directly used by mankind. Food products, timber, and medicinal products are examples of “*consumptive*” direct uses. “*Non-consumptive*” direct uses include hiking in or visiting and ecosystem. “*Indirect use values*” refer to ecosystem services which supply benefits beyond the particular ecosystem, for example water purification, which advantages people living downstream of a river, or carbon sequestration, which benefits the entire earth. “*Option values*” refer to possible future uses of ecosystems, either by the current generation (*option value*), or future generations (*bequest value*). “*Non-use values*” are derived from the pleasure obtained by knowing that a resource simply exists (“*existence value*”) (IBRD, 2005:10).

“*Direct use values*” tend to be the easiest to quantify, as they often involve measurable quantities of a product that has a market price. “*Recreational value*” can also easily be measured by counting the number of visits to an area. Measuring the benefits of visitors to an area is more challenging, but methods have been developed which consider visitors’ travel costs and willingness to pay to enter a protected area. Assessing “*indirect use values*” is more challenging than assessing “*direct use values*”, as the quantities of the services delivered are usually difficult to measure (IBRD, 2005:10). In addition, these services are often not sold on markets, so a market price cannot be determined (IBRD, 2005:11). The “*non-use value*” of an ecosystem (“*existence value*”) is the most challenging value to describe, as it is not usually observable, even in peoples’ behaviour. However, surveys can be used to estimate peoples’ willingness to pay to protect a species or ecosystem which they do not directly use (IBRD, 2005:12).

Many of the ecosystem benefits discussed above are included in national accounts (for example, “*extractive uses*”). However, many services are not considered at all (“*non-use values*” and “*indirect use values*”), or are attributed to other sectors of the economy (many

“*indirect use values*”) (IBRD, 2005:14). Therefore, the benefits supplied by the environment may appear to be much less than they really are (IBRD, 2005:15). If the costs and benefits of the various services provided by South Africa’s natural resources can better be quantified in monetary terms, it will certainly be easier to conserve them. For example, a farmer is much less likely to illegally remove a patch of indigenous fynbos from his land if he is aware of the value of the various services provided by the vegetation (IBRD, 2005:2).

The Total Economic Value [TEV] of a particular ecosystem (had it not been damaged by unlawful activity) could be used to calculate a s 24G administrative fine which more accurately reflects the environmental damage caused. A fine which accurately reflects the full extent of the economic cost of the damage caused by the non-compliance will certainly be seen by the public, the regulated community, and the offender, as more equitable. Admittedly, this may be difficult to implement in practice.

5.5 DIFFICULTIES WITH PRACTICAL IMPLEMENTATION OF RECOMMENDATIONS

The above suggestions to improve the effectiveness of s 24G as a deterrent for contravening environmental law certainly contain much merit. However, although these suggestions are sound in theory, there are a number of challenges facing the practical implementation of such recommendations. Some of these challenges, such as accurately determining financial gains, quantifying environmental damage arising from non-compliance, and determining degree of ignorance, are discussed above.

The basic origin of the challenges with implementing the measures suggested above, as September (2012:67) also notes, is a lack of financial resources, time, and human resources. In fact, Lehmann (2009:269) refers to such a lack of resources as: “*the Achilles heel of all law.*” Lehmann further notes that lack of resources is a particularly serious problem for developing countries, and as such, environmental management practices which do not utilise high amounts of state resources are increasing in use (Lehmann, 2009:269). Some of these innovative environmental management practices will be discussed in **Chapter 6**.

5.6 SUMMARY

Various measures have been suggested by different stakeholders to prevent s 24G from being used by dishonest individuals and businesses as a loophole to avoid the EIA process. The CER (2011) suggested numerous legislative amendments to both s 24F and s 24G, including raising the administrative fine and not allowing intentional offenders to apply for *ex post facto* authorisation. Another suggestion is to determine the economic value of the non-compliance to the company or individual. However, economic benefits from unlawful environmental activities are difficult to calculate as benefits can be long term or short term, and often come in different forms. In most cases the authority issuing the s 24G administrative fine is not trained to determine the financial benefits accumulated due to non-compliance (September, 2012:65). There are a number of challenges facing the practical implementation of recommendations to improve s 24G, most significantly a lack of financial resources, time, and human resources (September, 2012:67).

CHAPTER 6

PREVENTION IS BETTER THAN A CURE: IMPROVING ENVIRONMENTAL COMPLIANCE

6.1 INTRODUCTION

In order for NEMA to effectively protect the environment, society's compliance with its regulations is essential. Perhaps the answer to improving compliance with environmental law in South Africa does not involve retrospective, punitive measures such as s 24G, but instead in improving environmental compliance to begin with, through compliance promotion measures. Compliance promotion is described by the Organisation for Economic Co-Operation and Development (OECD) (2009:48) as: *“assistance, incentives, and other activities designed to promote observance of environmental requirements.”*

6.2 COMPLIANCE WITH ENVIRONMENTAL LAW

Non-compliance with NEMA is extremely common in South Africa (Craigie *et al.*, 2009; Fourie 2009; Kidd 2011). This is evidenced by the 2010/11 NECER, which found the commencement of listed activities without prior authorisation to be the most prevalent environmental transgression in every province but the Northern Cape (DEA, 2011).

Compliance can be defined as the obedience to legal requirements or principles and from a legal point of view, governance and regulation are futile without compliance (Craigie *et al.*, 2009:41). Traditionally, compliance is encouraged by criminal, judicial and administrative means, although voluntary and incentive-based means can also be employed to reward compliance (September, 2012:9).

Bowles (1971) believes that: *“20 percent of the regulated population will automatically comply with any regulation, 5 percent will attempt to evade it, and the remaining 75 percent will comply as long as they think that the 5 percent will be caught and punished.”* In September's (2012:59) opinion: *“the danger with s 24G is that the 75% of the regulated community*

perceive that intentional offenders are not adequately punished (very low prosecution rate coupled with relatively low fines) and systematically obtain authorisation, and start non-complying as a result, thereby increasing the proportion of non-compliance and potentially making a small problem unmanageable.”

Craigie *et al.* (2009:45) cite a number of reasons why environmental non-compliance is rife in South Africa. First, historical discrimination and injustice, as well as poor law enforcement, have led to increased environmental non-compliance. Also, restricted capacity and resources within the government makes enforcement and monitoring of compliance very difficult (Craigie *et al.*, 2009:45).

The compliance mechanisms used for environmental law in South Africa are traditional command-and-control mechanisms. A command-and-control system functions by prescribing legal obligations, and encouraging compliance through various enforcement measures, such as criminal, administrative and civil measures (September, 2012:12). These measures are intended to compel compliance, discipline violators, and/or prevent future non-compliance (Craigie *et al.*, 2009:45). Problems with command-and-control measures include that they are resource-heavy, time-consuming, costly, do not permit authorities to use their discretion, and present no incentive to go above and beyond the required standards (du Plessis and Nel, 2011).

The purpose of penalties, according to Macrory (2010:37), is to improve compliance by developing a “*transparent system with appropriate sanctions that would aim to get firms back into compliance, ensure future compliance, provide a level playing field for business and enable regulators to pursue offenders who flout the law in a more effective manner.*” In light of this, Macrory (2010:64) designed numerous principles of penalties, which are as follows:

Sanctions should:

- 1. Intend to improve the behaviour of the offender**

Instead of simply punishing an offender, a sanction should also encourage the offender to return to compliance and remain compliant.

- 2. Eliminate any financial gain or benefit from non-compliance**

No economic profits should be made from non-compliance. Therefore, sanctions should not allow businesses that have financially benefited from non-compliance to gain an advantage over law abiding businesses. Removing financial benefits also serves to decrease the incentive to break the law again.

3. Be at the discretion of the authority

Sanctions should be responsive to each individual situation and environmental offence. The authority should decide which sanction would be most appropriate in each situation, and most effective in bringing the offender back into compliance. Similarly, authorities should be able to impose a sanction in situations where a lesser punishment could be imposed.

4. Take into account the type of offence and the damage caused

Sanctions should consider the environmental consequences of the non-compliance so that offenders are fully accountable for their actions.

5. Attempt to restore the damage caused

In cases where a non-compliance results in harm to the environment or society, sanctions must provide incentives to institute remedial action and guarantee that offenders compensate those harmed.

6. Prevent future non-compliance

Sanctions should clearly demonstrate that non-compliance will not be allowed. Offenders should not get the idea that their non-compliance will be ignored or that they will be “*let off the hook*” easily.

Essentially, sanctions must decrease the incentive to contravene the environmental law by putting the offender in a worse position than those which complied with the law from the beginning (Macrory, 2010:37). Administrative fines, such as those issued to s 24G offenders, are administered directly by the government, and recipients have the right to appeal such fines (Macrory, 2010:79). Evidence has proven such fines to be an effective method to ensure compliance (Macrory, 2010:80; Fourie, 2009). Monetary penalties that can be varied depending on the nature of the contravention allow the authorities to use their discretion and consider various factors in deciding on an appropriate fine (September, 2012:22). Such

factors may include the compliance history of the offender, the damage caused to the environment, and the monetary strength of the business/individual (Macrory, 2010:80).

Although there is evidence that administrative fines, such as the fine issued to those applying for s 24G approval, improve compliance, financial penalties have numerous shortcomings, including the following (Macrory, 2010:100):

- **Deterrence:** a financial punishment is only effective if it is the right amount. Large businesses may simply pay small fines and consider them an overhead cost. As a result, such small fines have little influence on the environmental compliance of large businesses.
- **Spill over:** if the offender passes on the financial burden of the penalty to third parties such as shareholders, employees or customers, fines will not be effective.
- **Disproportionate impact:** smaller companies may be more negatively affected by monetary fines because of financial constraints.
- **Failure to rehabilitate:** ensuring long-term compliance can be expensive and time-consuming, therefore companies may regard fines as business losses instead of fixing the non-compliance. This is usually the case when non-compliance leads to substantial financial gains, and the fines are too small to negate these gains.

Alternatives to command-and-control measures

Due to the problems experienced when using command-and-control measures, South African policy-makers are increasingly looking for alternative compliance and enforcement measures. The two main types of alternative enforcement measures which will be discussed are incentive-based measures, and voluntary measures (Craigie *et al.*, 2009:58). These alternative measures follow the normative theory of compliance, which focuses on assisting the regulated community to encourage compliance, rather than punishing non-compliance (Craigie *et al.*, 2009:45).

Incentive-based measures

Incentive-based measures are established on the idea that it is most effective and efficient to reward positive behaviour rather than to punish unwanted behaviour. However, incentive-based measures can also include disincentives to discourage unwanted behaviours. The

most commonly employed incentive-based tool in South Africa is market-based incentives (Craigie *et al.*, 2009:58).

Market-based incentives make use of existing markets, or establish new markets, to manipulate economic behaviour and thereby encourage compliance with specific laws or standards, as well as discourage non-compliance. For example, in order to encourage certain behaviours, authorities can provide tax benefits, refund schemes, and subsidies. Non-compliance can also be discouraged using incentives, by imposing various disposal charges, user charges and taxes on members of the regulated community who do not comply with certain standards. Environmental taxes are a widely used market-based incentive tool, as they require less time and money from authorities, and they allow the regulated community to use the least expensive method of reaching the prescribed standard, and even go above and beyond the standard. In addition, environmental taxes are preventive, not reactive (Craigie *et al.*, 2009:58).

Voluntary measures

Voluntary measures refer to the wide variety of actions that companies undertake to improve their environmental performance. Voluntary measures include self-regulatory actions (eg. certification and labelling schemes, and corporate environmental responsibility programmes), as well as co-regulatory (e.g. co-operative agreements between public and/or private sectors). Voluntary measures are not required by law, and instead complement the standard compliance and enforcement regime. In South Africa, the ISO 14001 certification scheme is a widely employed voluntary compliance measure which standardizes environmental management systems (Craigie *et al.*, 2009:60).

6.3 IMPROVING COMPLIANCE WITH ENVIRONMENTAL LAW

Craigie *et al.* (2009) suggest that an integrated approach should be used to improve South Africa's environmental compliance and enforcement regime, which would differ from the current "*piecemeal*" approach, which emphasises certain priority areas and utilises mostly traditional criminal and administrative procedures.

Hart (1994) argues that in order to be successful, an environmental compliance and enforcement regime should incorporate incentives for those willing to comply, and sanctions for those who are not willing to comply. Complete transparency is also crucial, which includes an open enforcement policy, transparency of enforcement measures taken, identities of offenders, and the results of the case (Hart, 1994).

According to Craigie *et al.* (2009) and INECE (2009), crucial elements of a successful compliance and enforcement regime include the following:

- Rules and regulations that are enforceable
- Clear guidelines as to who is subject to the rules
- Fair and equal rules
- Encouragement of compliance
- Monitoring of compliance
- Non-compliances are dealt with
- The relationship between environmental compliance and economic development should be encouraged
- It must be ensured that those who are compliant with environmental law are not disadvantaged compared to those who are compliant

Increased compliance with environmental law not only protects the environment, it also decreases the monetary cost to the government of prosecution and remediation (Craigie *et al.*, 2009:61).

The Problem of the “Compliance Deficit”

Macrory (2010:57) describes a “*compliance deficit*” as a situation where non-compliance has been detected, but authorities do not act due to limited resources, and the time and expenses required by criminal proceedings. This “*compliance deficit*” situation could explain why September (2012:54) found the rate of prosecution for s 24G offenders to be extremely low. September (2012:54) attributed the low rate of prosecution to the authorities’ lack of time and resources, the congested court system, and insufficient convictions. The aforementioned challenges leave authorities with little incentive to pursue criminal prosecution for offenders, especially when the environmental damage is considered to be insignificant, and authorities may be hesitant to pursue criminal prosecution if they perceive the time and resources

required in the prosecution process to be greater than the potential penalty for the offender (September, 2012:54).

In her research, September (2012:54) found that the abovementioned challenges to pursuing criminal prosecution have led to authorities adopting a “*pick your battles*” standpoint, where they consider the environmental damage, available resources, and likelihood of a successful prosecution before deciding to pursue prosecution of an offender.

Trends in Environmental Compliance in South Africa

Some new developments in environmental and corporate law have improved corporate compliance with environmental regulations (September, 2012:29). While environmental compliance in the business world has always been seen as a financial expense and an administrative exercise, compliance is now being viewed as a matter of risk. The risks of non-compliance with environmental law include excess costs, liability, and a negative impact on the corporation’s image and competitiveness (Fet, 2002).

Relatively new measures which encourage corporate compliance with environmental law include (from September, 2012:29):

- Sustainability reports which detail environmental standards and compliance of companies
- Various labeling schemes
- Carbon footprinting projects

These new measures emerged from a variety of factors, such as greater awareness of mankind’s impacts on the environment, stricter regulatory controls, higher stakeholder expectations of corporate standards, and investors’ emphasis on sustainable business models (September, 2012:29). In response to the above mentioned measures, many businesses have shifted their focus from short-term, reactive approaches, to preventative measures, as well as a more pro-active approach which relates to the business’ general social and economic roles (Howes, 2005; Raufflet, 2006).

Corporate environments are increasingly being scrutinised by stakeholders based on their “*corporate social responsibility*”, “*triple bottom line*”, accountability, transparency and

ethical/sustainable practices (September, 2012:30). Due in part to such scrutiny by stakeholders, the corporate environment has adapted to become more open to sustainable business models by innovating incentives to increase environmental performance and minimise environmental risks (September, 2012:30). Many financial corporations now consider environmental risks when assessing loan requests, and compliance with environmental laws may be mandatory to access finance (OECD and EIRIS, 2003).

Numerous businesses currently believe that “*overcompliance*” with environmental regulations is a successful business tactic, and regard a reputation as a “*green*” company to be highly beneficial (Mehta and Hawkins, 1998). Harmful publicity regarding environmental practices can result in a company losing customers, alienating local communities, losing market share, and being more closely scrutinised by regulators (Thornton *et al.*, 2005:264).

Stock exchanges have begun to list companies as “*ethical*”, “*sustainable*”, and “*socially responsible*”, which has encouraged companies to improve their environmental performance (September, 2012:31). In particular, the Johannesburg Stock Exchange (JSE) initiated the Socially Responsible Investment (SRI) Index in 2004, after an increasing number of investors desired to know the environmental and social impacts of listed businesses (September, 2012:31). However, despite the above mentioned changes and improvements in environmental compliance, environmental non-compliance remains a problem in South Africa.

National Compliance and Enforcement in South Africa

Every year, or every two years, the national Department of Environmental Affairs (DEA) releases a NECER, which details the efforts of the various environmental authorities comprising the “*Environmental Management Inspectorate*” in enforcing compliance with environmental law. The “*Environmental Management Inspectorate*” consists of officials at national, provincial and local levels of government, who are responsible for completing criminal investigations and issuing directives and compliance notices (DEA, 2014:1). NECERs are intended for a wide variety of stakeholders, and are intended to provide the following (DEA, 2014:1):

- The general public with information regarding the actions of the environmental compliance and enforcement sector which enforces Section 24 of the Constitution;

- Groups such as non-governmental organisations and interest groups with information pertaining to compliance and enforcement tasks related to specific industries or facilities;
- Feedback to national, provincial and local environmental authorities regarding their compliance and enforcement efforts, compared to previous years as well as compared to departments in other provinces; and
- Records of consequences for contravening environmental laws to act as a deterrent for potential offenders.

In the foreword to the 2013/2014 NECER, Ishaam Abrader of the DEA emphasises the importance of societal compliance with environmental law. Abrader states that the impacts of non-compliance reach beyond the natural environment, affecting the economy, livelihoods, effective governance, and the rule of law. Abrader also states that properly enforcing environmental law benefits society by providing a healthy and safe environment for current and future generations. A stable investment situation, based on the rule of law, argues Abrader, further encourages economic growth.

Encouragingly, according to the 2013/2014 NECER, the number of Environmental Management Inspectors (EMIs) has increased more than twofold since being founded in 2007. This increase has led to improved environmental standards in the power generation and refinery industries, as a result of increased monitoring by EMIs. However, the NECER notes high rates of illegal actions in terms of environmental impact assessment regulations (DEA, 2013/14).

Environmental Management Inspectors

EMIs are employed as per provincial legislation and local by-laws, and are able to perform environmental compliance and enforcement tasks as stipulated by such legislation (DEA, 2014:5).

EMIs undertake compliance and enforcement tasks in various industries related to environmental management. These sectors are colour-coded into green, brown and blue. Green refers to biodiversity and protected areas, blue refers to integrated coastal management, and brown refers to pollution, waste and EIA (DEA, 2014).

EMIs are split into different categories which are graded based on the compliance and enforcement authority granted to them by Chapter 7 of NEMA. The latest data available in the national EMI register kept by the DEA records a total of 1915 EMIs throughout the country (DEA, 2014:5).

Table 6.1 below depicts the number of EMIs per institution. All the institutions listed experienced an increase in EMIs between 2011/12 and 2013/14, except for the DEA, the Mpumalanga DEDET, and Mpumalanga Parks, which decreased by only one EMI during this time period.

Table 6.1: Environmental Management Inspectorates per institution (DEA, 2014:6).

INSTITUTION	2011-2012	2012-2013	2013-2014
CapeNature	8	22	21
DEA	66	63	65
Eastern Cape DEDECT	39	39	48
Eastern Cape Parks	62	107	107
Ezemvelo	310	423	474
Free State DEDTEA	22	30	30
GDARD	43	70	64
Isimangaliso	4	5	5
KwaZulu- Natal DAEA	37	34	38
Limpopo DEDET	75	104	237
Mpumalanga DEDET	14	12	13
Mpumalanga Parks	11	11	10
Northern Cape DEANC	16	19	19
North West DEDECT	25	26	32
SANParks	603	672	686
Western Cape DEADP	64	68	66
TOTAL	1399	1705	1915

National Environmental Compliance and Enforcement Statistics

The following compliance and enforcement statistics are contained in the 2013/2014 NECER (the latest report at time of writing) and pertain to environmental compliance and enforcement at a national and provincial level.

Enforcement Statistics (DEA, 2014:3):

- *There has been a 34.52% increase in the number of reported environmental incidents, from 4 479 in 2012/13 to 6 025 in 2013/14.*

- *There was a general increase in the number of criminal dockets registered in the previous three financial year cycles, from 1 080 (50.42% increase) in 2011/12, 1 488 (37.7% increase) in 2012/13 and 1 862 (25% increase) in 2013/14.*
- *The number of criminal dockets handed to the NPA increased by 41.42% from 268 in 2012/13 to 379 in 2013/14.*
- *The total number of arrests by EMIs has decreased by 35.77% from 1 818 in 2012/13 to 1 371 in 2013/14.*
- *The total number of acquittals has remained the same at 8 in 2012/13 and 2013/14.*
- *Convictions reported have slightly increased by 11.43% from 70 reported in 2012/13 to 78 in 2013/14.*
- *There has been a decrease in the number of plea and sentence agreements reached from 14 in 2012/13 to 11 reported in 2013/14.*
- *The total number of warning letters issued has increased from 187 in 2012/13 to 228 in 2013/14 which equates to an increase of 21.93%.*
- *The total number of administrative notices issued increased by 22.88% from 577 in 2012/13 to 709 in 2013/14.*
- *The number of civil court applications launched decreased by 50% from 4 in 2012/13 to 2 in 2013/14.*
- *There was a dramatic increase by 199.48% in the total value of section 24G administrative fines paid from R 5,385,215 in 2012/2013 to R 16,127,751 in 2013/14.*

Compliance Monitoring Statistics (DEA, 2014:3):

- *There were a total of 2 849 facilities inspected in 2013/14, which reflects a 3% increase from the 2 766 facilities inspected in 2012/13.*
- *Of the total number of facilities inspected 71% (2019) were against brown legislative requirements, while 29% (830) were in the green subsector.*
- *There was a significant increase of 60% in the total number of proactive inspections conducted bringing the total from 1 215 in 2012/13 to 1 953 in 2013/14.*
- *The total number of reactive inspections conducted in 2013/14 amounted to 896, which reflects a 40.21 % increase from the 639 conducted in 2012/13.*
- *The total number of non-compliances detected during inspection has decreased from 2 482 in 2012/13 to 1 539 in 2013/14, representing a significant 61.23% decrease. Of the*

total number of non-compliances detected, 623 (616 Brown and 7 Green) resulted in enforcement action being taken. This figure represents an increase in non-compliances resulting in enforcement action of 18.3 % in comparison to the 2012/13 figure of 524. Put differently, while the total number of non-compliances detected has decreased significantly, those that require enforcement action have increased.

- *A total of 2 271 inspection reports were finalised in the 2013/14 financial year.*
- *Of the 2 849 inspections conducted, the greater majority (832) were as a result of routine inspections, 658 emanated from complaints and 343 were triggered by permit inspections.*

Statistics per institution/province (DEA, 2014:3):

- *SANParks recorded the highest number of criminal dockets registered at 532, followed closely by Ezemvelo² with 531 criminal dockets. The third highest was Limpopo DEDET with 435 dockets registered while Mpumalanga DEDET, North West Department of Economic Development, Environment, Conservation and Tourism (DEDECT) and KwaZulu-Natal DAEA reported no criminal cases.*
- *Ezemvelo recorded the highest number of arrests at 538, followed by Limpopo DEDET with 514 arrests.*
- *Admission of guilt fines (J534s) issued by Ezemvelo achieved the highest value bringing in a total of R462 350 from the 395 fines issued. This was followed by SANParks with a value of R341 685.00 from 549 fines issued.*
- *With a total of 173, the Western Cape DEADP recorded the highest number of administrative enforcement notices comprising of 113 pre-compliance notices, 21 final compliance notices, 29 pre-directives and 10 directives. With a total of 9, Limpopo DEDET reported the lowest number of administrative enforcement notices. These comprised of 2 pre-compliance notices and 7 pre-directives. SANParks, CapeNature, Ezemvelo, Eastern Cape Parks and Mpumalanga Parks recorded no administrative enforcement.*
- *Limpopo DEDET issued 80 warning letters, the highest of the EMI Institutions. They are followed by Mpumalanga DEDET who issued 52 warning letters.*

² Ezemvelo KZN Wildlife (Ezemvelo) is a governmental organisation responsible for maintaining conservation areas and public nature reserves in KwaZulu-Natal (KZN) Province.

- *DEA recorded the highest total value of S24G fines paid, being R 5 931 000 while the Western Cape DEADP had recorded R 3 495 975 and GDARD recorded a total payment of R 3 109 026.*
- *North West DEDECT recorded the highest number of facilities inspected at 943 of which 382 were in respect of brown issues and 561 on green issues. This was followed by KwaZulu-Natal DAEA with 872 (867 brown and 5 green) and Western Cape with 291 brown issues only. At 30 inspections, the Free State Department of Economic Development, Tourism and Environmental Affairs (DEDTEA) recorded the lowest number of facilities inspected.*
- *DEA recorded the highest number of non-compliances detected (708) during the execution of compliance inspections, followed by KwaZulu-Natal DAEA which detected 525 non-compliances and Western Cape DEA&DP with 184. Both Limpopo DEDET and the North West DEDECT reported 40 non-compliances. Free State DEDTEA detected 22 non-compliances while Mpumalanga DEDET reported 20 non-compliances.*

According to the above statistics, the general enforcement of environmental legislation seems to have improved, with an increase in the number of criminal dockets recorded between 2011/12 and 2013/14, although the number of arrests by EMLs decreased. The number of warning letters and administrative notices issued both increased by approximately 22% between 2012/13 and 2013/14. Noticeably, between 2012/13 and 2013/14, there was a remarkable increase of approximately 200% in the total value of s 24G administrative fines paid (DEA, 2014:3). In terms of compliance monitoring, the number of inspections (both proactive and reactive) increased since 2012/13, and the total number of non-compliances detected during monitoring has decreased. However, although the number of non-compliances detected has decreased, the number of non-compliances resulting in enforcement action has increased (DEA, 2014:3).

With regards to the Western Cape, the DEA&DP registered the highest number of administrative enforcement notices (173 in total), as well as the second highest total value of s 24G administrative fines paid during 2013/14. The DEA&DP ranked third behind the DEA and the Kwa-Zulu Natal DAEA in terms of non-compliances detected (DEA, 2014:3).

Most Widespread Environmental Crimes Reported

According to the 2013/14 NECER, the most common environmental crimes uncovered by EMIs were similar to previous years. In the “*brown*” sub-sector, the illegal commencement of listed activities was the most prevalent non-compliance, while illegal hunting was the most widespread environmental offense in the “*green*” sub-section (DEA, 2014:13).

Table 6.2 below depicts the specific national legislation being disobeyed. NEMA (illegal commencement of listed activities) and the NEM:BA (specifically the TOPS and CITES Regulations) are the most commonly contravened environmental legislation in South Africa (DEA, 2014:14).

Table 6.2: The most commonly contravened environmental legislation (from DEA, 2014:15).

Legislation	Ezemvelo	GDARD	Free State DEDTEA	North West DEDECT	Limpopo DEDET	Northern Cape	DEA	Western Cape DEADP	Eastern Cape Parks	Eastern Cape DEDET	Mpumalanga DEDET	KwaZulu-Natal DAEA	CapeNature	SANParks	Isimangaliso	Mpumalanga Parks	North West Parks	TOTAL
NEMA (including EIA Regulations)	32	167	21	15	17	69	94	197	-	105	52	423	-	-	-	-	-	1192
NEM:BA including TOPS & CITES Regulations	553	737	66	31	-	2	-	-	3	26	-	-	-	-	10	-	28	1456
NEM:PAA	74	-	-	2	-	-	-	-	3	1	-	-	-	-	7	-	-	87
APPA	-	-	-	-	-	-	15	-	-	-	-	-	-	-	-	-	-	15
NEM:AQA	-	12	-	-	-	-	8	-	-	-	-	-	-	-	-	-	-	20
NEM:WA	-	28	-	1	-	-	76	-	1	6	-	3	-	-	-	-	-	115
ECA	-	44	20	-	-	-	33	-	-	-	-	5	-	-	-	-	-	102
MLRA	469	1	-	-	-	-	-	-	7	-	-	-	29	-	-	1	-	507
NWA	-	-	-	-	-	-	8	-	-	-	-	-	-	-	-	-	-	8
Sub-Total	1128	989	107	49	17	71	234	197	14	138	52	431	29	-	17	0	28	3501

Compliance Monitoring by EMIs

Effective monitoring is crucial to ensuring compliance with environmental legislation, and without such monitoring, non-compliance may remain unnoticed and the proper enforcement action will not be taken. The DEA emphasises the importance of compliance monitoring: “*Conducting compliance monitoring inspections to ascertain whether or not the regulated community is complying with the relevant legislative provisions, as well as with any and all authorisations, licences and permits issued in terms of this legislation, plays a critical role in ensuring continued compliance*” (DEA, 2014:15).

Tables 6.4 and 6.5 (split into two) below depict compliance inspections undertaken during 2013/14, consisting of both “*brown*” and “*green*” activities. It is important to remember that the number of facilities inspected does not automatically correlate with the number of environmental authorisations, licences or permits issued, as one facility may require multiple authorisations, licences and permits (DEA, 2014:15).

Table 6.2: The number of compliance monitoring inspections undertaken by various EMI Institutions during 2013/14 (from DEA, 2014:15).

Source of trigger for inspection										
Institution	Complaint	Compliance Monitoring	Enquiry	Follow-up	Permit	Pro-active Inspection	Referral	Routine Inspection	Unspecified	Grand Total
CapeNature	-	-	-	-	152	-	-	-	-	152

Source of trigger for inspection										
Institution	Complaint	Compliance Monitoring	Enquiry	Follow-up	Permit	Pro-active Inspection	Referral	Routine Inspection	Unspecified	Grand Total
DEA	-	16	-	-	-	26	-	-	-	42
Free State DEDTEA	4	-	-	2	-	23	-	-	1	30
GDARD	-	-	-	-	-	-	-	-	182	182
KwaZulu-Natal	175	-	31	-	52	-	1	606	7	872
Limpopo DEDET	53	4	2	17	10	57	-	1	-	144
Mpumalanga	68	28	-	-	-	5	-	-	-	101
North West DEDECT	70	2	-	-	37	182	-	225	427	943
Northern Cape DEANC	-	-	-	-	92	-	-	-	-	92
Western Cape DEADP	288	-	-	-	-	3	-	-	-	291
Grand Total	658	50	33	19	343	296	1	832	617	2849

Table 6.3: Number of “brown” facilities inspected by various EMI Institutions during 2013/14 (DEA, 2014:16).

Institution	Number of facilities inspected	Proactive	Reactive	Number of non-compliances	Enforcement action required
DEA	42	42	–	708	8
Free State DEDTEA	9	6	3	11	4
GDARD	182	160	22	0	57
KwaZulu-Natal DAEA	867	670	197	523	317
Limpopo DEDET	144	142	2	40	27
Mpumalanga DEDET	101	38	63	20	48
North West DEDECT	382	311	71	40	67
Western Cape DEADP	291	0	291	184	88
TOTAL	2018	1369	649	1526	616

Use of Enforcement Mechanisms and Convictions by EMIs

According to the NECER for 2013/14, administrative enforcement (directives and notices) is the tool favoured by EMIs addressing “brown” issues. During 2013/14, the DEA&DP issued the highest number of directive and notices (DEA, 2014:29) (refer to **Figure 6.2** below).

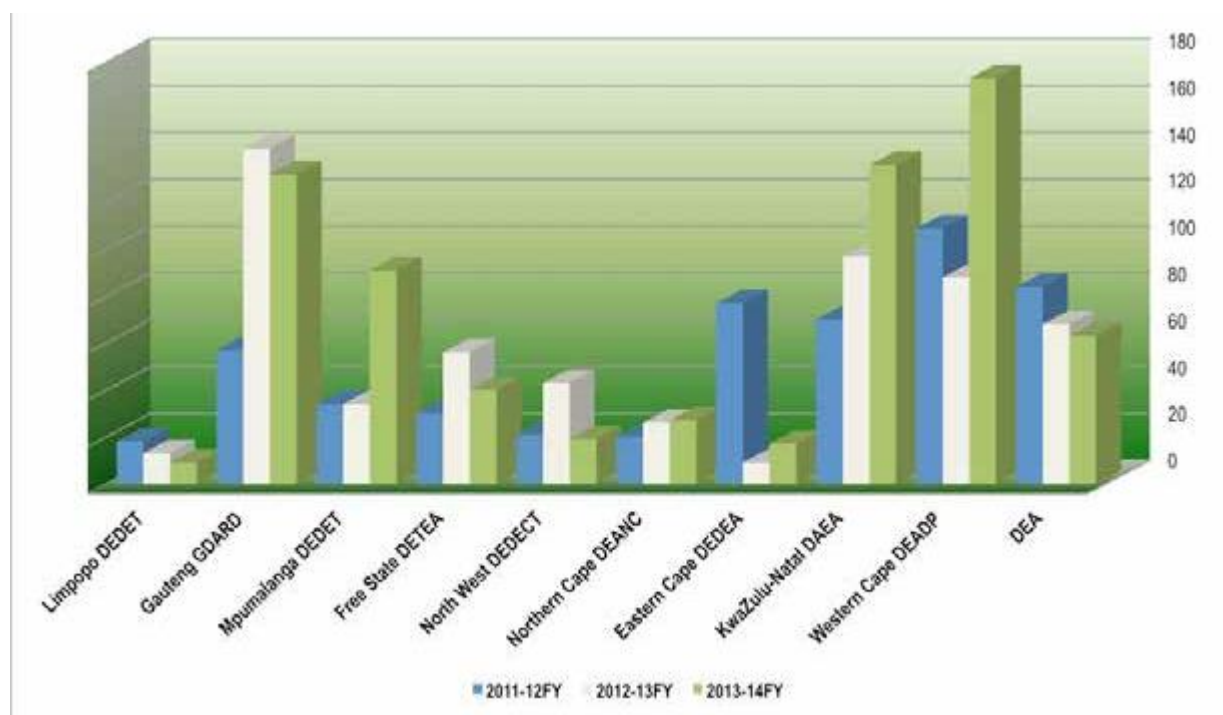


Figure 6.1: The number of administrative enforcement tools (i.e. directives and notices) utilised by EMI Institutions during 2013/14 (from DEA, 2014:29).

Environmental Crimes and Incidents Complaints

The NECER reported statistics regarding environmental grievances received from the Environmental Crimes and Incidents Hotline, as well the Minister's office, and various other organs of state. The aforementioned hotline appears to be the preferred method of reporting environmental offences and emergency situations, and excludes complaints sent directly to government/EMI authorities. The total number of complaints has increased from 467 in 2012/13 to 536 in 2013/14, with unlawful development and poaching showing considerable increases (DEA, 2014:68). The controversial s 24G attempts to address such complaints and unlawful developments.

6.4 BENEFITS OF COMPLIANCE

As the OECD (2009:48) states, improved compliance financially benefits both authorities and the regulated community. Compliance decreases the financial burden on authorities as less time and money can be spent on enforcement of laws, as well as remediation of environmental damage caused by non-compliance. The regulated community benefits from compliance in avoiding fines such as s 24G, as well as avoiding negative publicity surrounding environmental non-compliance (Craigie *et al.*, 2009; OECD, 2009:48).

The regulated community must be made aware of the economic benefits of compliance, such as increased efficiency and innovation. The regulated community must also be assisted by authorities in their efforts to comply with environmental law. The following measures are suggested to assist the regulated community in compliance: establishing an incentive based structure, and providing EMIs, other support staff, and educational programmes to assist the regulated community in understanding their environmental responsibilities (Craigie *et al.*, 2009).

6.5 POSITIVE AND NEGATIVE INCENTIVES

The OECD (2009:53) found that countries rarely offer direct financial rewards to industry for compliance with environmental regulations, as a matter of principle. However, there are countries which offer financial incentives available for companies prepared to invest in innovative environmental technologies, especially when such technologies enable companies to go beyond mere compliance (OECD, 2009:53).

The OECD (2009:55) discusses adverse publicity as an effective negative incentive and deterrent for non-compliance with environmental law. This could include the public “*naming and shaming*” of companies who do not comply. A negative impact on a company’s public image, reputation and competitiveness acts as a major incentive for compliance (OECD, 2009:55; September, 2012:70). This is evidenced in that the main reasons why companies willingly adopt environmental management systems are to ease pressure from consumers and other stakeholders, as well as to avoid liability for environmental damage. Companies wish to maintain a positive environmental image in the public eye, which is why they often publish annual sustainability reports, especially in industries notorious for causing environmental damage, such as the mining and petroleum industries (Lehmann, 2009). In addition, public disclosure can lead to market repercussions and public pressure against offenders (OECD, 2009: 55). It has been observed that after specific cases of enforcement are made public, other companies with similar environmental issues use the information to solve any non-compliances they may have, and companies have even contacted environmental authorities for advice in doing so (OECD, 2009:55). While companies who fail to comply with environmental laws should be publically named, companies going above and beyond the minimum standard for compliance should also be given public recognition (Lehmann, 2009).

6.6 COMPLIANCE PROMOTION THROUGH EDUCATION AND SUPPORT

It is important to realise that the incentive based structure described above will only be successful if companies are educated on their environmental responsibilities. It is thus vitally important that companies be supported in designing their internal environmental management programmes. Although companies may be aware of the importance of complying with environmental law, they may be unsure of how to develop and implement a suitable plan of action (Bregmann *et al.*, 1996). Bregmann *et al.* (1996) describes the difficulty companies face in educating each employee on environmental standards, complicated by the laws frequently changing. In addition, legislation is often written using language that is often unintelligible to the average person (Bregmann *et al.*, 1996). Therefore, according to the OECD (2009:48), businesses should be provided with support in comprehending and

complying with regulations. Such support will guarantee that companies are aware of their environmental obligations and assist them with the knowledge necessary to improve their capacity to comply (OECD, 2009:48).

Jankousky (1994:35) names three crucial aspects of an environmental compliance program, namely: identifying and categorising environmental activities, determining relevant regulatory requirements, and training employees. Therefore, the first step for establishing an effective environmental management and compliance program would be assessing the specific environmental requirements imposed on the business. The business must determine which environmental regulations are relevant to its operations, and which of its actions are most likely to cause non-compliances (Bregmann *et al.*, 1996). This is where the government could assist by providing capable, trained individuals to provide such knowledge and education to businesses. Regular follow-up visits must also be conducted to ensure continued compliance and to identify possible weaknesses in the environmental management system. Jankousky (1994) describes important tools in supporting companies in their environmental management programs. These tools include environmental compliance manuals, self-inspection guidebooks, a system to track activities and follow up on activities identified during self-inspections, availability of expert advice if necessary, and regular compliance audits undertaken by an objective third party (Jankousky, 1994:35).

Jankousky (1994:36) argues that companies aiming to be effective at environmental compliance must consider environmental compliance like other important business functions. This involves setting goals, initiating plans to reach these goals, allocating resources to support the plan, regularly measuring progress towards the goals, and rewarding employees for their contributions toward achieving the goals. If a company has vague statements about its environmental responsibility, but does not have clear environmental management goals and systems for encouraging employee cooperation, the company is unlikely to achieve employee behaviour which supports these environmental goals (Jankousky, 1994:36). In fact, incentives for employees to comply with environmental systems, such as financial bonuses, as well as recognition of efforts, is listed by Jankousky (1994:36) as one of the factors needed to exhibit commitment to environmental compliance. A company which rewards employees for reaching certain financial targets, without providing incentives to encourage environmental

compliance, risks forcing employees to choose between being financially rewarded or promoted, and complying with environmental standards. In companies with prominent environmental compliance systems, it will be in the employee's best interest financially to comply (Jankousky, 1994:36).

6.7 THE IMPORTANCE OF EFFECTIVE ENFORCEMENT IN PROMOTING COMPLIANCE

According to the OECD (2009:24), there are three important elements of ensuring environmental compliance, which are mutually supportive. First is compliance promotion, which includes incentives, education and support, as described above. Second is compliance monitoring, which consists of audits and self-monitoring, also described above. The third element described by the OECD (2009:24) is enforcement, which involves actions taken by the authorities to force offenders to return to compliance, as well as punish non-compliance. The OECD (2009:25) emphasises the importance of efficient enforcement due to the rational behaviour that can be expected of individuals and companies.

According to Jankousky (1994), both individuals and businesses behave rationally (i.e. in a manner which will promote their own best interest, usually in an economic sense). Businesses aim to maximize shareholder value, which is in their best interest. Economically, there is no clear evidence that taking action to improve environmental compliance will maximize shareholder value, especially in the short term. Therefore, decision makers within a business, taking only financial considerations into account, would not willingly forfeit operating outputs unless forced to do so by environmental law. If the likelihood of being caught and punished for environmental non-compliance is lower than 100 percent, then some businesses may choose to rationally act in their best interest and break the law, if they perceive the benefits of non-compliance (in terms of cost savings) to outweigh the risks (Jankousky, 1994:35). Therefore it is crucially important in the promotion of environmental compliance that enforcement is effective and that businesses do not expect to get away with non-compliance unpunished (OECD, 2009:25; September, 2012:59). Enforcement must also be swift and fair, with penalties great enough to negate the benefits of non-compliance (OECD, 2009:25). This is

especially relevant when businesses are given an “*escape route*” in the form of s 24G (September, 2012:60).

6.8 HOW COMPLIANCE PROMOTION CAN BE USED WITH REGARDS TO S 24G

As discussed above, providing incentives may be an effective measure to improve businesses’ compliance with environmental law. In South Africa, a positive incentive which can be used to encourage compliance with environmental law is a financial reward or tax benefit for a certain period of compliance (e.g. five consecutive years). Financial incentives can also be used for companies which go above and beyond mere compliance, such as companies which make an extra effort to reduce emissions below the standard, or decrease their carbon footprint significantly.

Publically “*naming and shaming*” non-compliant companies, as discussed by the OECD (2009:55), could be used as a negative incentive in South Africa. The environmental authorities already produce a NECER every two years, and the names of non-compliant companies, as well as companies with excellent environmental compliance records, could be published in this report. Publicising the names and environmental crimes of non-compliant companies will also increase the public’s awareness of environmental laws and regulations, and the public can, in turn, help keep companies accountable to the law. Consumers will also then be aware and able to make environmentally sound choices and use their money/buying power to exert influence.

As discussed above, an important aspect of compliance promotion is providing businesses with adequate support to comply with environmental laws (OECD, 2009:48). Environmental authorities in South Africa should be trained to provide support to companies in understanding environmental regulations, and developing effective environmental management programmes. Training workshops could be offered to educate staff working for companies in certain industries on their environmental responsibilities and the negative consequences of non-compliance. This type of support should prove to decrease the number of s 24G applications submitted due to ignorance, neglect and negligence.

6.9 SUMMARY

There are a number of reasons why environmental non-compliance is rife in South Africa, including historical discrimination, poor law enforcement, and restricted capacity and resources within government. The answer to improving compliance with environmental law in South Africa may lie in improving environmental compliance through compliance promotion measures, such as financial incentives, naming and shaming, and providing businesses with adequate support to comply with environmental law. Improved compliance financially benefits both authorities and the regulated community. Compliance decreases the financial burden on authorities as less time and money can be spent on enforcement of laws, as well as remediation of environmental damage caused by non-compliance.

CHAPTER 7

CONCLUSION

7.1 INTRODUCTION

This research critically examines the effectiveness of s 24G in supporting and upholding South Africa's environmental legislation by asking the question: is s 24G an effective deterrent for contravening environmental law in South Africa?

A major complaint regarding s 24G is that the administrative fines issued are too low to act as a deterrent for unscrupulous businesses and individuals. The findings of this research show that despite a consistent increase in average amount of administrative fines every year since 2006, the number of s 24G applications received by the DEA&DP has also increased consistently. This result would appear to suggest that the administrative fines issued are not acting as a deterrent for non-compliance with environmental law. However, this conclusion must be further examined.

7.2 REASONS FOR INCREASE IN S 24G APPLICATIONS

It should not be assumed that an increasing number of s 24G applications reflects increasing non-compliance with NEMA EIA Regulations. The increasing number of s 24G applications observed by the DEA&DP since 2006 could be due to increased awareness of environmental legislation, leading to members of the regulated community reporting their own environmental non-compliances in order to return to compliance. Also, environmental enforcement in South Africa has improved steadily, as described in the 2013/2014 NECER. Improved enforcement of environmental law can be expected to lead to more effective detection of non-compliance, which could explain the increasing number of s 24G applications.

7.3 REDUCING NON-COMPLIANCE DUE TO IGNORANCE

Officials involved with s 24G applications have estimated that a vast majority of applications are due to simple ignorance of environmental law (September, 2012:42). In cases of ignorance, the administrative fine associated with s 24G would not act as a deterrent,

because the offender does not have knowledge of the law. In fact, in some cases the administrative fine issued to such an individual could be financially crippling (September, 2012:50). The results of this study show that most s 24G applications are from businesses. Therefore, the number of s 24G applications can be decreased by improving business' knowledge of environmental law and therefore assisting them in avoiding non-compliances due to ignorance. Environmental education and monitoring programmes within companies should also serve to decrease non-compliances due to employee negligence.

7.4 REDUCING NON-COMPLIANCE DUE TO WILLFUL DISREGARD

Although the vast majority of s 24G applications are due to ignorance, some are due to willful disregard for environmental law. Willful offenders may follow the s 24G route in order to save time and money, or if they do not expect to be granted environmental authorisation through the traditional EIA process. Such offenders are the cause of the controversy surrounding s 24G. Stakeholders and members of the public are concerned that s 24G provides an “*escape route*” for these criminals (September, 2012:2). The concerns surrounding willful offenders can be addressed by effective enforcement, so that the likelihood of being caught in non-compliance is great. A high likelihood of being detected, as well as a substantial fine which negates all gains from illegal activity, should deter potential willful offenders. The possibility of profits from environmental crimes being forfeited has significant value as a deterrent (Craigie *et al.*, 2009:54). This approach should be successful in deterring non-compliance, according to the deterrence theory, which describes the inverse relationship between the likelihood of punishment and the number of offenders (September, 2012:52).

Compliance with the proper EIA process should be rewarded and not perceived to be a burden, and instead seen as a mechanism to avoid non-compliance and therefore avoid additional costs (September, 2012:63). In order to prevent the regulated community from preferring the s 24G option over the traditional EIA process in order to save time, the entire EIA process must be streamlined to be more efficient. Alberts (2011) emphasises the importance of changing the negative perceptions of the EIA process by streamlining the process. The amended 2014 EIA Regulations attempt to streamline the EIA process by requiring most of the specialist studies and assessment work to be done prior to submission

of the Application Form. This prevents EAPs from using the EIA process to formulate the project, thus saving time. However, delays are still experienced in the issuing and signing off of Environmental Authorisations. The lack of resources in government departments causing such backlogs must be addressed in order for the EIA process to operate at maximum efficiency. In addition, September (2012:63) suggests implementing norms and standards in certain sectors to reduce the need for EIAs.

7.5 NECESSITY OF S 24G

There are many issues and factors surrounding the s 24G process which make it difficult to determine its effectiveness as a deterrent for non-compliance with environmental law. Solutions which seem apparent, such as increasing the administrative fine, could have unintended consequences such as discouraging truly “*innocent*”, ignorant offenders from coming forward due to fear of a crippling administrative fine (CER, 2011). However, although s 24G has challenges, it is a necessary provision. For example, s 24G makes provision for emergency situations. Some actions taken during emergency situations may prevent environmental damage, or promote human well-being. In addition, since most offences are due to ignorance, s 24G allows offenders to restore compliance, and prevent future non-compliance (September, 2012:49).

7.6 RECOMMENDATIONS

The OECD (2009:17) explains the importance of environmental compliance in contributing to good governance: “...*create a predictable investment climate based on the rule of law, thereby stimulating economic development and innovation and enhancing markets for environmental goods and services.*” Due to political corruption, unreliable electricity supply, and high crime rates, South Africa already risks a reputation as being an unpredictable investment climate. Not only will improving compliance with environmental law support compliance with the rule of law in general, it will also save resources (time and financial) for our already overburdened government officials.

As suggested in **Chapter 6**, deterring non-compliance with environmental law does not rest solely on s 24G. Instead, considering the results of this research, the most effective method of

detering non-compliance consists of a combination of an improved s 24G, and compliance promotion programmes to educate and assist businesses and individuals in understanding and implementing environmental regulations and monitoring programmes. Perhaps as knowledge of environmental laws improves, and companies implement effective environmental monitoring programmes, the rectification of unlawful commencement of listed activities will become obsolete, and can be phased out of the legislation.

7.7 SUMMARY

Despite a consistent increase in average amount of administrative fines every year since 2006, the number of s 24G applications received by the DEA&DP has also increased consistently. This would appear to suggest that administrative fines are not acting as a deterrent for non-compliance with environmental law. However, it should not be assumed that an increasing number of s 24G applications reflects increasing non-compliance with NEMA EIA Regulations as the increasing number of s 24G applications could be due to increased awareness of environmental legislation, leading to members of the regulated community reporting their own environmental non-compliances in order to return to compliance. It is argued that the number of s 24G applications can be decreased by improving business' knowledge of environmental law and therefore assisting them in avoiding non-compliances due to ignorance. Improving compliance with environmental law will support compliance with the rule of law in general, and will also save resources (time and financial) for government departments.

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Addendum A: NEMA Sections 24F and 24G as amended

Please note that most Acts are published in English and another South African official language. Currently we only have capacity to publish the English versions. This means that this document will only contain even numbered pages as the other language is printed on uneven numbered pages.



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 582

Cape Town 18 Dcember'201'

No. 37170

THE PRESIDENCY

No. 1019

18 December 2013

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

Act No. 30 of 201' : National Environmental Management Laws Second Amendment Act, 201'



AIDS HELPLINE: 0800-123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President)
(Assented to 14 December 2013)

ACT

To amend the National Environmental Management Act, 1998, so as to amend certain definitions; to adjust the timeframes for the preparation of environmental implementation plans and environmental management plans; to provide for the process and procedure for submitting environment outlook reports; to promote or facilitate the mainstreaming of integrated, environmentally sustainable and sound management considerations into business processes, practices, technology and decision-making across the economy; to enable, as appropriate, the use of spatial tools, norms and standards and environmental management instruments in decision-making as an alternative to environmental authorisation procedures; to empower the Minister to restrict or prohibit development in specified geographical areas; to empower the Minister or MEC to develop norms and standards for activities, sectors and geographical areas; to clarify when the Minister is the competent authority; to identify the Minister as the competent authority where the MEC is usually the competent authority and a Cabinet decision stipulates that the Minister must be the competent authority for activities related to a matter declared as a national priority or matters related to such national priority; to empower the Minister to take a decision in the place of the MEC under certain circumstances; to allow for the transfer of rights and obligations relating to an environmental authorisation; to provide legal clarity on the applicability of section 24G to the unlawful commencement, undertaking or conducting of a waste management activity under the National Environmental Management: Waste Act, 2008; to provide legal clarity on the options available to the competent authority in processing a section 24G application, to increase the administrative fine and to provide for criminal investigation and prosecution in certain circumstances; to further provide for exemptions under certain circumstances and to clarify that there will be no exemptions provided from obtaining an environmental authorisation; to provide for the consideration of adopted environmental management instruments when considering an environmental authorisation application; to provide for emergency situations and to distinguish between an “incident” and an “emergency situation”; to provide for the power and the circumstances under which an environmental management inspector may, without a warrant, seize any mechanism of transport; to insert provisions to regulate products which have a detrimental effect on the environment; to provide for all regulations to be tabled in Parliament before promulgation; to add provisions regarding the delivery of documents; to consolidate all offences and penalties under the Act; and to correct

or delete certain obsolete provisions; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 107 of 1998, as amended by section 1 of Act 56 of 2002, section 1 of Act 46 of 2003, section 1 of Act 8 of 2004, section 60 of Act 39 of 2004, section 3 of Act 44 of 2008, section 1 of Act 62 of 2008 and section 4 of Act 14 of 2009 5

1. Section 1 of the National Environmental Management Act, 1998 (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the substitution for the definition of “activities” of the following definition: 10

“**‘activities’**, when used in Chapter 5, means policies, programmes, processes, plans and projects identified in terms of section 24(2)(a) and (b);”;
- (b) by the substitution for the definition of “commence” of the following definition: 15

“**‘commence’**, when used in Chapter 5, means the start of any physical implementation in furtherance of a listed activity or specified activity, including site preparation and any other [activity] action on the site [in furtherance of a listed activity or specified activity] or the physical implementation of a plan, policy, programme or process, but does not include any [activity] action required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity;”;
- (c) by the substitution for the definition of “Department” of the following definition: 25

“**‘Department’** means the Department [of Environmental Affairs and Tourism] responsible for environmental affairs;”;
- (d) by the substitution for the definition of “Director-General” of the following definition: 30

“**‘Director-General’** means the Director-General of [Environmental Affairs and Tourism] the Department;”;
- (e) by the substitution for the definition of “environmental assessment practitioner” of the following definition: 35

“**‘environmental assessment practitioner’**, when used in Chapter 5, means the individual responsible for the planning, management [and], coordination or review of environmental impact assessments, strategic environmental assessments, environmental management [plans] programmes or any other appropriate environmental instruments introduced through regulations;”;
- (f) by the substitution for the definition of “specific environmental management Act” of the following definition: 40

“**‘specific environmental management Act’** means—

 - (a) the Environment Conservation Act, 1989 (Act No. 73 of 1989);
 - (b) the National Water Act, 1998 (Act No. 36 of 1998);
 - (c) the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003);
 - (d) the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004); [or]
 - (e) the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004); 50
 - (f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008);
 - (g) the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008); or

(h) the World Heritage Convention Act, 1999 (Act No. 49 of 1999), and includes any regulation or other subordinate legislation made in terms of any of those Acts;”.

Amendment of section 11 of Act 107 of 1998, as amended by section 7 of Act 14 of 2009

5

2. Section 11 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) Every national department listed in Schedule 1 as exercising functions which may affect the environment and every [province] provincial department responsible for environmental affairs must prepare an environmental implementation plan within [one year of the promulgation] five years of the coming into operation of this Act, and at [least every four] intervals of not more than five years thereafter.

(2) Every national department listed in Schedule 2 as exercising functions involving the management of the environment must prepare an environmental management plan within [one year of the promulgation] five years of the coming into operation of this Act, and at [least every four] intervals of not more than five years thereafter.”.

Insertion of section 16A in Act 107 of 1998

3. The following section is hereby inserted in the principal Act after section 16: 20

“Environment outlook report

16A. (1) The Minister must within four years of the coming into operation of the National Environmental Management Laws Second Amendment Act, 2013, prepare and publish a national environment outlook report for the Republic and at intervals of not more than four years thereafter. 25

(2) An MEC must—

(a) prepare and publish a provincial environment outlook report which must contain the information determined by the Minister in terms of subsection (4); and 30

(b) within four years of the coming into operation of the National Environmental Management Laws Second Amendment Act, 2013, submit the report to the Minister and at intervals of not more than four years thereafter.

(3) A metropolitan or a district municipality may prepare and publish a municipal environment outlook report which must— 35

(a) contain the information determined by the Minister in terms of subsection (4); and

(b) be submitted to the Minister and MEC within four years of the coming into operation of the National Environmental Management Laws Second Amendment Act, 2013 and at intervals of not more than four years thereafter. 40

(4) The Minister must, for the purposes of the environment outlook reports contemplated in subsection (2) and (3), by notice in the *Gazette*, determine— 45

(a) the procedure for compiling the report;

(b) the format; and

(c) the content of the report.

(5) The Minister must prescribe the process for the submission, evaluation and adoption of the environment outlook report. 50

(6) The relevant organs of state must co-operate with the Minister or MEC by furnishing the Minister or MEC with information required for inclusion in a national or a provincial environment outlook report.

(7) The Minister may, at the request of a province, assist with the preparation of a provincial environment outlook report. 55

(8) The MEC may, at the request of a municipality, assist with the preparation of a municipality’s environment outlook report.”.

Insertion of section 23A in Act 107 of 1998

4. The following section is hereby inserted in the principal Act after section 23:

“Mainstreaming environmental management

- 23A.** (1) The Minister may, with a view to promote or facilitate integrated, environmentally sustainable and sound management, provide for— 5
- (a) the guidelines on the development, content and use of voluntary organisation or sector based instruments; and
 - (b) the circumstances under which such instruments may be submitted to and considered by the Minister. 10
- (2) Such instruments must, at least—
- (a) integrate environmental considerations into decision-making;
 - (b) provide for the implementation of best environmental practice;
 - (c) promote the progressive adoption of environmentally sound technology; or 15
 - (d) promote sustainable consumption and production, including, where appropriate, eco-endorsement or labelling.
- (3) In his or her consideration of such instruments, the Minister may—
- (a) as appropriate, engage with the organisation or sector concerned, as the case may be, on the content and use of its instrument if the organisation or sector concerned, as the case may be, requires the Minister to endorse or approve such instrument; or 20
 - (b) endorse or approve such instrument.”.

Amendment of section 24 of Act 107 of 1998, as substituted by section 2 of Act 62 of 2008 25

5. Section 24 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for paragraphs (b), (c) and (d) of the following paragraphs, respectively:
 - “(b) geographical areas based on environmental attributes, and as specified in spatial development tools adopted in the prescribed manner by the **[environmental authority]** Minister or an MEC, with the concurrence of the Minister, in which specified activities may not commence without an environmental authorisation **[by]** from the competent authority; 30
 - (c) geographical areas based on environmental attributes, and specified in spatial **[development]** tools or environmental management instruments, adopted in the prescribed manner by the **[environmental authority]** Minister or an MEC, with the concurrence of the Minister, in which specified activities may be excluded from the requirement to obtain an environmental authorisation from the competent authority; **[or]** 35
 - (d) activities contemplated in paragraphs (a) and (b) that may **[commence without]** be excluded from the requirement to obtain an environmental authorisation from the competent authority, but that must comply with prescribed norms or standards~~[:]; or~~”; 40 45
- (b) by the addition to subsection (2) of the following subparagraph:
 - “(e) activities contemplated in paragraphs (a) and (b) that, based on an environmental management instrument adopted in the prescribed manner by the Minister or an MEC, with the concurrence of the Minister, may be excluded from the requirement to obtain an environmental authorisation from the competent authority.”; 50

(c) by the insertion after subsection (2) of the following subsection:

“(2A) (a) In accordance with the risk averse and cautious approach contemplated in section 2(4)(a)(vii) and subject to paragraphs (e) and (f), the Minister may by notice in the *Gazette* prohibit or restrict the granting of an environmental authorisation by the competent authority for a listed or a specified activity in a specified geographical area for such period and on such terms and conditions as the Minister may determine, if it is necessary to ensure the protection of the environment, the conservation of resources or sustainable development.

(b) Where the Minister has exercised his or her powers in terms of paragraph (a), the competent authority must—

- (i) not accept any further application for an environmental authorisation for the identified listed or specified activity in the identified geographical area until such time that the prohibition has been lifted; and
- (ii) deem all pending applications to have been withdrawn.

(c) The exercise of the Minister’s powers in terms of paragraph (a) does not affect the undertaking of activities authorised by means of an environmental authorisation prior to the prohibition or restriction becoming effective.

(d) Where the prohibition or restriction affects the exercise of a power that an MEC has in terms of this Act, the prohibition or restriction contemplated in paragraph (a) may be published in the *Gazette* after consulting the MEC concerned.

(e) The Minister may by notice in the *Gazette*—

- (i) lift a prohibition or restriction made in terms of paragraph (a) if the circumstances which caused the Minister exercise his or her powers in terms of paragraph (a) no longer exist; or
- (ii) amend any period, term or condition applicable to a prohibition or restriction if the circumstances which caused the Minister to exercise his or her powers in terms of paragraph (a) have changed.

(f) Before the exercise of his or her powers in terms of paragraph (a), the Minister must—

- (i) consult all Cabinet members whose areas of responsibility will be affected by the exercise of the power;
- (ii) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult an MEC who will be affected by the exercise of the power; and
- (iii) publish a notice in the *Gazette* inviting members of the public to submit to the Minister, within 30 days of publication of the notice in the *Gazette*, written representations on the proposed prohibition or restriction.”;

(d) by the insertion in subsection (5) after paragraph (bA) of the following paragraph:

“(bB) laying down the procedure for the preparation, evaluation and adoption of the instruments referred to in subsection (2)(c), (d) and (e), including criteria or conditions to be included in such instruments;”;

(e) by the substitution in subsection (10)(a) for subparagraph (i) of the following subparagraph:

- “(i) develop or adopt norms or standards for—
 - (aa) a listed activity or specified activity contemplated in subsection (2)(a) and (b);
 - (bb) any part of the listed or specified activity referred to in item (aa);
 - (cc) any sector relating to item (aa);
 - (dd) any geographical area relating to item (aa); or
 - (ee) any combination of the activities, sectors, geographical areas, listed activities or specified activities referred to in items (aa), (bb), (cc) and (dd);”.

Amendment of section 24C of Act 107 of 1998, as substituted by section 3 of Act 62 of 2008**6. Section 24C of the principal Act is hereby amended—**

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 5
 “The Minister must be identified as the competent authority in terms of subsection (1), unless otherwise agreed to in terms of section 24C(3), if the activity—”;
- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 10
 “(a) has implications for international environmental commitments or relations, and where—
 (i) it is identified by the Minister by notice in the *Gazette*; or
 (ii) it is an activity that takes place in an area protected by means of an international environmental instrument, other than— 15
 (aa) a conservancy;
 (bb) a protected natural environment;
 (cc) a proclaimed private nature reserve;
 (dd) a natural heritage site;
 (ee) the buffer zone or transitional area of a biosphere reserve;
 or
 (ff) the buffer zone or transitional area of a world heritage site;”;
- (c) by the deletion in subsection (2) of paragraph (b);
- (d) by the insertion after subsection (2A) of the following subsection: 25
 “(2B) (a) Notwithstanding the other provisions of this section, and in the event of the Minister not being the competent authority, the Minister must be identified as the competent authority where a Cabinet decision stipulates that the Minister must be the competent authority for activities related to a matter declared as a national priority or matters related to such national priority. 30
 (b) Notice must be given by the Minister in the *Gazette* approximately 90 days prior to the Cabinet decision referred to in paragraph (a).
 (c) The notice referred to in paragraph (b) must as a minimum contain the following information: 35
 (i) The proposed decision to be considered by Cabinet and its rationale;
 (ii) the approximate date of the consideration of the proposed decision by Cabinet;
 (iii) the proposed date on which the decision will come into effect;
 (iv) the proposed time-frame for which the Minister will be the 40
 competent authority, where appropriate;
 (v) the activities contemplated in section 24(2)(a) or geographical areas contemplated in section 24(2)(b); and
 (vi) any transitional arrangements that may be applicable to applications for environmental authorisations that already have been or are being 45
 processed.
 (d) Once Cabinet has made the decision referred to in paragraph (a), the Minister must publish the decision by notice in the *Gazette*.”; and
- (e) by the addition of the following subsections: 50
 “(4) In accordance with section 125(2)(b) of the Constitution, whenever an MEC fails to take a decision on an application for an environmental authorisation within the time periods prescribed by this Act, the applicant may apply to the Minister to take the decision. 50
 (5) The applicant must notify the MEC in writing of the intention to exercise the option in subsection (4) at least 30 days prior to the exercising of such option. 55

(6) The application contemplated in subsection (4) must, at least, contain all the documents submitted to the MEC in order to enable the Minister to take a decision.

(7) Before taking a decision contemplated in subsection (4), the Minister must request the MEC to provide him or her with a report within a specified time period on the status and causes of delay in the application.

(8) After having received the report referred to in subsection (7) or in the event that no response or no satisfactory response or cooperation is received from the MEC within the specified time period the Minister must, where appropriate—

- (a) inform the applicant in the event that the MEC had complied with the relevant prescripts;
- (b) assist the MEC in accordance with section 125(3) of the Constitution to fulfil his or her obligations under this Act; or
- (c) direct the MEC to take the decision and such other steps as the Minister may deem necessary within a specified time period.

(9) In the event that the MEC fails to take the decision within the specified time period or in any other manner fails to comply with the directive contemplated in subsection (8)(c), the Minister must take the decision within a reasonable period of time.

(10) The Minister must, simultaneously with the submission of the annual report contemplated in section 40(1)(d)(i) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), submit a report to Parliament setting out the details regarding the exercise of the power referred to in subsection (8) during the previous financial year.”.

Amendment of section 24E of Act 107 of 1998, as inserted by section 3 of Act 8 of 2004

7. Section 24E of the principal Act is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) provision is made for the transfer of rights and obligations [**when there is a change of ownership in the property**].”.

Amendment of section 24F of Act 107 of 1998, as inserted by section 3 of Act 8 of 2004 and amended by section 5 of Act 62 of 2008

8. Section 24F of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

“**[Offences] Prohibitions relating to commencement or continuation of listed activities**”; and

- (b) by the deletion of subsections (2), (3) and (4).

Substitution of section 24G of Act 107 of 1998, as substituted by section 6 of Act 62 of 2008

9. The following section is hereby substituted for section 24G of the principal Act:

“Consequences of unlawful commencement of activity

24G. (1) On application by a person who—

- (a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1);
- (b) has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008),

the Minister, Minister responsible for mineral resources or MEC concerned, as the case may be, may direct the applicant to—

- (i) immediately cease the activity pending a decision on the application submitted in terms of this subsection;

- (ii) investigate, evaluate and assess the impact of the activity on the environment;
 - (iii) remedy any adverse effects of the activity on the environment;
 - (iv) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation;
 - (v) contain or prevent the movement of pollution or degradation of the environment;
 - (vi) eliminate any source of pollution or degradation;
 - (vii) compile a report containing—
 - (aa) a description of the need and desirability of the activity;
 - (bb) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;
 - (cc) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;
 - (dd) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed;
 - (ee) an environmental management programme; or
 - (viii) provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.
- (2) The Minister, Minister responsible for mineral resources or MEC concerned must consider any report or information submitted in terms of subsection (1) and thereafter may—
- (a) refuse to issue an environmental authorisation; or
 - (b) issue an environmental authorisation to such person to continue, conduct or undertake the activity subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary, which environmental authorisation shall only take effect from the date on which it has been issued; or
 - (c) direct the applicant to provide further information or take further steps prior to making a decision provided for in paragraph (a) or (b).
- (3) The Minister, Minister responsible for mineral resources or MEC may as part of his or her decision contemplated in subsection (2)(a), (b) or (c) direct a person to—
- (a) rehabilitate the environment within such time and subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary; or
 - (b) take any other steps necessary under the circumstances.
- (4) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2)(a) or (b).
- (5) In considering a decision contemplated in subsection (2), the Minister, Minister responsible for mineral resources or MEC may take into account whether or not the applicant complied with any directive issued in terms of subsection (1) or (2).

(6) The submission of an application in terms of subsection (1) or the granting of an environmental authorisation in terms of subsection (2)(b) shall in no way derogate from—

- (a) the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of this Act or any specific environmental management Act;
- (b) the National Prosecuting Authority's legal authority to institute any criminal prosecution.

(7) If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the Minister, Minister for mineral resources or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F(1) or section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC may defer a decision to issue an environmental authorisation until such time that the investigation is concluded and—

- (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
- (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or
- (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.”.

Amendment of section 24M of Act 107 of 1998, as inserted by section 8 of Act 62 of 2008

10. Section 24M of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

“(1) The Minister or MEC, as the case may be, may grant an exemption from any provision of this Act, except from the provision of section 24(4)(a) or the requirement to obtain an environmental authorisation contemplated in section 24(2)(a) or (b).”; and

- (b) by the deletion in subsection (4) of the word “or” at the end of paragraph (b), the insertion of the expression “; or” after the word “parties” at the end of paragraph (c) and the addition to that subsection of the following paragraph:

“(d) the activity is of national or provincial importance and is aimed at preventing or mitigating serious harm to the environment or property.”.

Amendment of section 24O of Act 107 of 1998, as inserted by section 8 of Act 62 of 2008

11. Section 24O of the principal Act is hereby amended by the substitution in subsection (1)(b) for subparagraph (viii) of the following subparagraph:

“(viii) any guidelines, departmental policies, and **[decision making]** environmental management instruments that have been **[developed or]** adopted in the prescribed manner by the Minister or MEC, with the concurrence of the Minister, and any other information in the possession of the competent authority that are relevant to the application; and”.

Amendment of section 28 of Act 107 of 1998, as amended by section 12 of Act 14 of 2009

12. Section 28 of the principal Act is hereby amended—

- (a) by the substitution for subsection (4) of the following subsection:

“(4) The Director-General or a provincial head of department may, **[after consultation with any other organ of state concerned and]** after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who **[fails to take the**

measures required under subsection (1)] is causing, has caused or may cause significant pollution or degradation of the environment to—

- (a) **[investigate, evaluate and assess the impact of specific activities and report thereon]** cease any activity, operation or undertaking;
- (b) **[commence taking specific reasonable measures before a given date]** investigate, evaluate and assess the impact of specific activities and report thereon;
- (c) **[diligently continue with those measures; and]** commence taking specific measures before a given date;
- (d) **[complete them before a specified reasonable date]** diligently continue with those measures; and
- (e) complete those measures before a specified reasonable date:

Provided that the Director-General or a provincial head of department may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable.”;

- (b) by the substitution in subsection (5) for paragraph (e) of the following paragraph:

“(e) the desirability of the State fulfilling its role as custodian holding the environment in public trust for the people; and”;
- (c) by the substitution for subsection (7) of the following subsection:

“(7) Should a person fail to comply, or inadequately comply, with a directive under subsection (4), the Director-General or a provincial head of department **[responsible for environmental affairs]** may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief.”; and
- (d) by the deletion of subsections (14) and (15).

Amendment of section 30 of Act 107 of 1998, as amended by section 13 of Act 14 of 2009

13. Section 30 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

“**Control of [emergency] incidents**”;
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) ‘**incident**’ means an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property.”; and
- (c) by the deletion of subsection (11).

Insertion of section 30A in Act 107 of 1998

14. The following section is hereby inserted in the principal Act after section 30:

“Emergency situations

30A. (1) The competent authority may on its own initiative or on written or oral request from a person, direct a person verbally or in writing to carry out a listed or specified activity, without obtaining an environmental authorisation contemplated in section 24(2)(a) or (b), in order to prevent or contain an emergency situation or to prevent, contain or mitigate the effects of the emergency situation.

(2) The request from the person referred to in subsection (1) must at least include, where known—

- (a) the nature, scope and possible impact of the emergency situation;
- (b) the listed or specified activities that will be commenced with in response to the emergency situation;

- (c) the cause of the emergency situation; and
- (d) the proposed measures to prevent or to contain the emergency situation or to prevent, contain or mitigate the effects of the emergency situation.
- (3) The competent authority may direct the person to undertake specific measures within a specific time period in order to prevent or contain an emergency situation or to prevent, contain or mitigate the effects of the emergency situation. 5
- (4) The verbal directive referred to in subsection (1) must be confirmed in writing at the earliest opportunity, which must be within seven days. 10
- (5) Before making a decision contemplated in subsection (3), the competent authority must at least, where information is available, consider—
- (a) the nature of the emergency situation;
- (b) the information contained in the request referred to in subsection (2);
- (c) whether the emergency situation was caused by or the fault of the person;
- (d) the principles in section 2;
- (e) the risk of the impact on the environment as a result of the emergency and the costs of the measures considered; and 20
- (f) the risk of the impact on the environment of the emergency situation, prevention, control or mitigation measures and the post-event mitigation or rehabilitation measures that may be required.
- (6) If the competent authority decides not to issue a directive provided for in subsection (1), the activity cannot commence or continue in the absence of an environmental authorisation. 25
- (7) In this section ‘emergency situation’ means a situation that has arisen suddenly that poses an imminent and serious threat to the environment, human life or property, including a ‘disaster’ as defined in section 1 of the Disaster Management Act, 2002 (Act No. 57 of 2002), but does not include an incident referred to in section 30 of this Act.”. 30

Amendment of section 31J of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003

15. Section 31J of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 35
- “An environmental management inspector, within his or her mandate in terms of section 31D, may, without a warrant, enter and search any vehicle, vessel or aircraft, or search any pack-animal or any other mechanism of transport, on reasonable suspicion that that vehicle, vessel, aircraft [or], pack animal or other mechanism of transport—;”; and 40
- (b) by the substitution for subsection (2) of the following subsection: 45
- “(2) An environmental management inspector may, without a warrant, seize a vehicle, vessel, aircraft, pack-animal or any other mechanism of transport or anything contained in or on any vehicle, vessel, aircraft [or], pack-animal [that may be used as evidence in the prosecution of any person for an offence in terms of this Act or a specific environmental management Act] or other mechanism of transport— 50
- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence;
- (b) which may afford evidence of the commission or suspected commission of an offence;
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence; or
- (d) which, on reasonable grounds, is being utilised in a manner that is likely to cause significant pollution, impact or degradation of the environment, 55
- in terms of this Act or a specific environmental management Act.”.

Amendment of section 31N of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003 and amended by section 7 of Act 44 of 2008 and section 20 of Act 14 of 2009

16. Section 31N of the principal Act is hereby amended by the deletion of subsections (1) and (3).

Amendment of section 31Q of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003 5

17. Section 31Q of the principal Act is hereby amended by the deletion of subsection (2).

Repeal of section 34A of Act 107 of 1998

18. Section 34A of the principal Act is hereby repealed. 10

Amendment of section 34H of Act 107 of 1998, as inserted by Act 14 of 2009

19. Section 34H of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1):

“(2) Where a competent authority is of the view that a more severe penalty could be considered than those penalties referred to in section 49B, the competent authority may request the National Prosecuting Authority to institute the criminal proceedings in the High Court.”. 15

Insertion of section 39A in Act 107 of 1998

20. The following section is hereby inserted in the principal Act after section 39:

“Prohibition of certain products 20

39A. The Minister may from time to time regulate, prohibit or control the production, sale, distribution, import or export of products that may have a substantial detrimental effect on the environment.”.

Amendment of section 44 of Act 107 of 1998, as amended by section 2 of Act 56 of 2002 25

21. Section 44 of the principal Act is hereby amended—

(a) by the deletion in subsection (1) of the word “and” at the end of paragraph (aA) and the insertion after that paragraph of the following paragraphs:

“(aB) dealing with the production, prohibition, control, sale, distribution, import or export of products that may have a substantial detrimental effect on the environment; 30

(aC) relating to the procedure and criteria to be followed in the determination of an administrative fine in terms of section 24G;

(aD) relating to the procedure to be followed when oral requests are made in terms of section 30A; and”; and 35

(b) by the insertion after subsection (1) of the following subsections:

“(1A) Any regulation made under subsection (1) must be made after consultation with all Cabinet members whose areas of responsibility will be affected.

(1B) Until such time that the regulations made under subsection (1) have come into effect, the existing standard operating procedure, adopted by the Minister for determining administrative fines in terms of section 24G, applies.”. 40

Amendment of section 47 of Act 107 of 1998, as amended by section 5 of Act 8 of 2004 and section 11 of Act 62 of 2008

22. Section 47 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) The Minister must, **[within] 30 days [after promulgating and publishing]** before the final publication of any regulations made under this Act, table the regulations in **[the National Assembly and the National Council of Provinces, and an MEC must so table the regulations in the relevant provincial legislature or, if Parliament or the provincial legislature is then not in session, within 30 days after the beginning of the next ensuing session of Parliament or the provincial legislature]** Parliament.”;

(b) by the insertion after subsection (2) of the following subsection:

“(2A) An MEC must, 30 days before the final publication of any regulations made under this Act, table the regulations in the relevant provincial legislature.”; and

(c) by the deletion of subsection (3).

Amendment of section 47D of Act 107 of 1998, as inserted by section 11 of Act 46 of 2003

23. Section 47D of the principal Act is hereby amended—

(a) by the deletion in subsection (1)(b) of the word “or” at the end of subparagraph (ii) and the insertion in subsection (1) after paragraph (b) of the following paragraphs:

“(bA) by faxing a copy of the notice or other document to the person, if the person has a fax number;
(bB) by e-mailing a copy of the notice or other document to the person, if the person has an e-mail address; or
(bC) by posting a copy of the notice or other document to the person by ordinary mail, if the person has a postal address;”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) A notice or other document issued in terms of subsection (1)(b), (bA), (bB), (bC) or (c) must be regarded as having come to the notice of the person, unless the contrary is proved.”.

Repeal of section 48 of Act 107 of 1998

24. Section 48 of the principal Act is hereby repealed.

Insertion of sections 49A and 49B in Act 107 of 1998

25. The following sections are hereby inserted in the principal Act after section 49:

“Offences

49A. (1) A person is guilty of an offence if that person—

- (a) commences with an activity in contravention of section 24F(1);
- (b) fails to comply with any applicable norm or standard contemplated in section 24(2)(d);
- (c) fails to comply with or contravenes a condition of an environmental authorisation granted for a listed activity or specified activity or an approved environmental management programme;
- (d) commences or continues with an activity in terms of section 24(2)(c), (d) or (e) unless he or she complies with the procedures, criteria or conditions specified by the Minister or MEC in any regulation made under section 24(5)(bB);
- (e) unlawfully and intentionally or negligently commits any act or omission which causes significant pollution or degradation of the

- environment or is likely to cause significant pollution or degradation of the environment;
- (f) unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to detrimentally affect the environment; 5
- (g) fails to comply with a directive issued in terms of this Act;
- (h) fails to comply with or contravenes any condition applicable to an exemption granted in terms of section 24M;
- (i) fails to comply with section 30(3), (4), (5) or (6);
- (j) contravenes section 31(7) or (8); 10
- (k) fails to comply with or contravenes a compliance notice issued in terms of section 31L;
- (l) discloses information about any other person if that information was acquired while exercising or performing any power or duty in terms of section 31Q(1); 15
- (m) hinders or interferes with an environmental management inspector in the execution of that inspector's official duties;
- (n) pretends to be an environmental management inspector, or the interpreter or assistant of such an inspector;
- (o) furnishes false or misleading information when complying with a request of an environmental management inspector; 20
- (p) fails to comply with a request of an environmental management inspector.
- (2) It is a defence to a charge in terms of subsection (1)(a) to show that the activity was commenced or continued with in response to an incident or emergency situation contemplated in section 30 or section 30A, as the case may be, so as to protect human life, property or environment: Provided that— 25
- (a) in the case of an incident, the response is in compliance with the obligations contemplated in section 30(4) and was necessary and proportionate in relation to the threat to human life, property or environment; and 30
- (b) in the case of an emergency situation contemplated in section 30A, the response is in compliance with a directive issued in terms of section 30A. 35

Penalties

- 49B.** (1) A person convicted of an offence in terms of section 49A(1)(a), (b), (c), (d), (e), (f) or (g) is liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment. 40
- (2) A person convicted of an offence in terms of section 49A(1)(i), (j) or (k) is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years, and in the case of a second or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment. 45
- (3) A person convicted of an offence in terms of section 49A(1)(h), (l), (m), (n), (o) or (p) is liable to a fine or to imprisonment for a period not exceeding one year, or to both a fine and such imprisonment.”.

Substitution of certain expressions in Act 107 of 1998

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26. The principal Act is hereby amended—

- (a) by the substitution for the expression “Minister of Minerals and Energy”, wherever it occurs, of the expression “Minister responsible for mineral resources”;
- (b) by the substitution for the expression “Minister of Water Affairs and Forestry”, wherever it occurs, of the expression “Minister responsible for water affairs”; and 55

- (c) by the substitution for the expression “Minister of Environmental Affairs and Tourism”, wherever it occurs, of the expression “Minister responsible for environmental affairs.”.

Amendment of Schedule 3 to Act 107 of 1998, as substituted by section 8 of Act 8 of 2004 and amended by section 25 of Act 14 of 2009

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27. Schedule 3 to the principal Act is hereby amended by the substitution for the wording in the sixteenth row of the third column of the following wording:

“[Sections 24F(1) and (2), 24G(3), 28(14), 30(11), 31N(1) and 34A(a), (b), (c) and (d)] Section 49A”.

Amendment of Table of Contents of Act 107 of 1998

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28. The Table of Contents of the principal Act is hereby amended—

- (a) by the insertion after item 16 of the following item:
“16A. Environment Outlook Report”;
- (b) by the insertion after item 23 of the following item:
“23A. Mainstreaming environmental management”;
- (c) by the substitution for item 24F of the following item:
“24F. Prohibitions relating to commencement or continuation of listed activities”;
- (d) by the substitution for item 24G of the following item:
“24G. Consequences of unlawful commencement of activity”;
- (e) by the substitution for item 30 of the following item:
“30. Control of incidents”;
- (f) by the insertion after item 30 of the following item:
“30A. Emergency situations”;
- (g) by the insertion after item 39 of the following item:
“39A. Prohibition of certain products”; and
- (h) by the insertion after item 49 of the following items:
“49A. Offences
“49B. Penalties”.

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Short title and commencement

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29. (1) This Act is called the National Environmental Management Laws Second Amendment Act, 2013, and all the sections of the Act, except for sections 3, 4, 5 and 14, come into operation on the date of publication of this Act by the President in the *Gazette* in terms of section 81 of the Constitution.

(2) Sections 3, 4, 5 and 14 take effect on a date 12 months from the date contemplated in subsection (1) or on a date fixed by the President by proclamation in the *Gazette*, whichever is the earliest.

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Addendum B: 2011 submission by the Centre for Environment Rights to the DEA



Centre for
Environmental Rights
Advancing Environmental Rights in South Africa

Linda Garlipp
Chief Director: Legal Services
Department of Environmental Affairs
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12 May 2011

Dear Linda

CONCERNS ABOUT AND SUGGESTIONS FOR AMENDMENT OF SECTIONS 24F AND 24G OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT 107 OF 1998)

Thank you for this opportunity to provide inputs into a proposed amendment of section 24G of the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA). It appears that the application of the rectification mechanism in s.24G has had unfortunate unintended consequences for environmental management, and it has been a thorn in the flesh of civil society organisations for some years.

The Centre for Environmental Rights spent the last few weeks collecting and collating comments and suggestions received from the Centre's wider stakeholder network on s.24G, and now attach those comments to this submission (**Annexure B**). Most of those who commented were representatives of non-government and community organisations (plus a few academics), but we have also had some comments from experienced environmental assessment practitioners and other consultants who work with s.24G on a regular basis. The individuals and organisations also represent large portions of the country, including Gauteng, Western Cape, KwaZulu-Natal.

Several recurring and remarkably consistent themes appear from these comments:

1. insufficient provision within s.24G to cater for different responses to different levels of fault. Intentional and repeat offenders are let off too easily, while innocent offenders are prejudiced by the criminal stigma that attaches to s.24G in the context of strict liability under s.24F;
2. administrative and criminal fines that are way too low to constitute a proper disincentive for non-compliance. There also seems to be a tendency for fines to be reduced on appeal. There is also general concern about a lack of transparency in the calculation of fines, giving rise to concerns about corruption;
3. the cynical abuse of s.24G whereby companies simply budget for the administrative fine and then proceed with contraventions of s.24F (and do not stop when caught out). There also seems to be a trend to rely on the emergency defence in s.24F(3) to criminal liability, followed by a s.24G application;

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4. the phenomenon of repeat offenders, and the need for a register of offenders, particularly to capture violators who commit s.24F offences in different provinces;
5. a perception that s.24G applications always end in authorisations being granted;
6. a perception that authorities are less keen to prosecute contraventions of s.24F where s.24G applications are submitted, effectively creating an escape route from criminal prosecution for violators;
7. a lack of clarity and insufficient communication to interested and affected parties about the process around the s.24G application and particularly public participation. There is also concern about the lack of consideration of alternatives in a s.24G application, as would be required in an EIA; and
8. generally speaking, most (but not all) participants felt that s.24G did serve some purpose, and were opposed to its abolition.

Against the background of these concerns, the Centre has drafted amendments to s.24F and s.24G for consideration by the Department. We attach as **Annexure A** our proposed amendments, and attach as **Annexure B** a marked-up version of s.24F and s.24G with explanatory notes.

We understand that our proposal requires officials in the competent authority to engage with the legal concepts of guilt and the different legal requirements for intention, negligence and innocence. However we do not believe that this is insurmountable, and can be addressed through internal guidelines.

We hope that you will give serious consideration to our proposal. Please let me know if you have any questions or requests in relation to this proposal – we have obviously given this extensive thought. Thanks again for the opportunity to provide input.

Yours sincerely

A handwritten signature in purple ink, appearing to read 'M Fourie'.

Melissa Fourie
Executive Director

ANNEXURE A

24F Offences relating to commencement or continuation of listed activity

- (1) Notwithstanding any other Act, no person may-
 - (a) commence an activity listed or specified in terms of section 24 (2) (a) or (b) unless the competent authority or the Minister of Mineral Resources, as the case may be, has granted an environmental authorisation for the activity; or
 - (b) commence and continue an activity listed in terms of section 24 (2) (d) unless it is done in terms of an applicable norm or standard.
- (2) It is an offence for any person to fail to comply with or to contravene-
 - (a) subsection (1)(a) ;
 - (b) subsection (1) (b) ;
 - (c) the conditions applicable to any environmental authorisation granted for a listed activity or specified activity;
 - (d) any condition applicable to an exemption granted in terms of section 24M; or
 - (e) an approved environmental management programme.
- (3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment.
- (4) A person convicted of an offence in terms of subsection (2) is liable to:
 - (a) a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, if that person is a natural person; and
 - (b) a fine not exceeding the greater of 10% of the person's annual turnover in the Republic and its exports from the Republic during the person's preceding financial year, or R10 million, if that person is not a natural person.
- (5) When determining the penalty under subsection (4), a court must have regard all relevant factors, including the following:
 - (a) the extent of the intention or negligence of the person who committed the offence in terms of section 24F (2) (a);
 - (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment;
 - (c) the degradation of the environment caused by the commission of the offence;
 - (d) the behaviour of the person who committed the offence;
 - (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence;
 - (f) the degree to which the person who committed the offence has cooperated with authorities;
 - (h) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act; and
 - (i) the amount of any administrative fine paid in terms of section 24G (3) (b).

24G Additional consequences of unlawful commencement or continuation of listed activity

- (1) A person who has committed an offence in terms of section 24F (2) (a) must immediately cease the commencement or continuation of the activity or activities that constituted the offence and take reasonable measures to mitigate degradation of the environment caused by the commission of the offence and to prevent further degradation of the environment.
- (2) A person who has committed an offence in terms of section 24F (2) (a) and who is unable to show, on a balance of probabilities, that the offence was not committed intentionally, must, to the satisfaction of the competent authority or the Minister of Mineral Resources, as the case may be, rehabilitate all degradation

of the environment caused by the commission of the offence, without the option of applying for an environmental authorisation in terms of subsection (3).

- (3) A person who has committed an offence in terms of section 24F (2) (a) and who, on a balance of probabilities, is able to show that the offence was not committed intentionally but is unable to show that the offence was not committed negligently, and who has –
 - (a) complied with subsection (1); and
 - (b) paid an administrative fine determined by the competent authority in terms of subsection (7) below - may be directed by the Minister, Minister of Mineral Resources or MEC concerned, as the case may be, either to:
 - (i) wholly or in part rehabilitate all degradation of the environment caused by the commission of the offence, without the option of applying for an environmental authorisation in accordance with subsection (5);
 - (ii) wholly or in part rehabilitate all degradation of the environment caused by the commission of the offence, and apply for an environmental authorisation in accordance with subsection (5); or
 - (iii) apply for an environmental authorisation in accordance with subsection (5).
- (4) Subsection (3) applies to a person who has committed an offence in terms of section 24F (2) (a) and who is able to show, on a balance of probabilities, that the offence was not committed intentionally or negligently, except that such a person does not have to pay the administrative fine in subsection (3) (b).
- (5) Where the Minister, Minister of Mineral Resources or MEC concerned, as the case may be, has directed a person to apply for an environmental authorisation in terms of this section, that person must:
 - (a) compile a report containing -
 - (i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;
 - (ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;
 - (iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;
 - (iv) an environmental management programme; and
 - (b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.
- (6) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (5) and thereafter may-
 - (a) direct the person to rehabilitate all degradation of the environment caused by the commission of the offence in terms of section 24F(2) (a) within such time and subject to such conditions as the Minister or MEC may deem necessary; or
 - (b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.
- (7) The administrative fine payable in terms of this section may not exceed R10 million and must be determined by the competent authority having regard to all relevant factors, including the following:
 - (a) the extent of the intention or negligence of the person who committed the offence in terms of section 24F(2)(a);
 - (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment;
 - (c) the degradation of the environment caused by the commission of the offence;
 - (d) the behaviour of the person who committed the offence;
 - (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence;
 - (f) the degree to which the person who committed the offence has cooperated with authorities; and

- (h) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act.
- (8) Except for a person mentioned in subsection (4), no application in terms of subsection (3) or any environmental authorisation issued in terms of subsection (6) (b) shall derogate from liability under section 24F(2).
- (9) A person who fails to comply with subsection (1) or a directive contemplated in subsection (3) or (4) or who contravenes or fails to comply with a condition contemplated in subsection (6) (b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F (4).

ANNEXURE B: MARKED-UP, WITH EXPLANATORY NOTES

24F Offences relating to commencement or continuation of listed activity

- (1) Notwithstanding any other Act, no person may-
 - (a) commence an activity listed or specified in terms of section 24 (2) (a) or (b) unless the competent authority or the Minister of Mineral Resources, as the case may be, has granted an environmental authorisation for the activity; or
 - (b) commence and continue an activity listed in terms of section 24 (2) (d) unless it is done in terms of an applicable norm or standard.
- (2) It is an offence for any person to fail to comply with or to contravene-
 - (a) subsection (1)(a) ;
 - (b) subsection (1) (b) ;
 - (c) the conditions applicable to any environmental authorisation granted for a listed activity or specified activity;
 - (d) any condition applicable to an exemption granted in terms of section 24M; or
 - (e) an approved environmental management programme.
- (3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment.
- (4) A person convicted of an offence in terms of subsection (2) is liable to:
 - (a) a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, if that person is a natural person; and
 - (b) a fine not exceeding the greater of 10% of the person's annual turnover in the Republic and its exports from the Republic during the person's preceding financial year, or R10 million, if that person is not a natural person.

Note: The objective of this subsection (4) is to ensure a criminal fine for bigger companies that is a proper disincentive to contravention of s.24F. This penalty formulation in (ii) is based on s.59(2) of the Competition Act.

- (5) When determining the penalty under subsection (4), a court must have regard all relevant factors, including the following:
 - (a) the extent of the intention or negligence of the person who committed the offence in terms of section 24F (2) (a);
 - (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment;
 - (c) the degradation of the environment caused by the commission of the offence;
 - (d) the behaviour of the person who committed the offence;
 - (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence;
 - (f) the degree to which the person who committed the offence has cooperated with authorities;
 - (h) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act; and
 - (i) the amount of any administrative fine paid in terms of section 24G (3) (b).

Note: This provision is intended to give guidance to the court deciding an appropriate sentence (and of course for the parties involved in negotiations for a plea and sentence agreement). The particular factors are based on a combination of the factors for determining administrative penalties set out in s.59(3) of the Competition Act and the factors for criminal fines set out in s.52 of the National Environmental Management: Air Quality Act, 2004. Note, in particular, the reference to repeat offenders in (h), and the requirement that administrative penalties paid under s.24G should be taken into account in the case of negligent offenders (as appears below, intentional offenders never pay an administrative fine and cannot apply for rectification).

24G Additional consequences of unlawful commencement or continuation of listed activity

Note: We think it's important to take out the reference to "rectification" to change the perceptions around this section.

- (1) A person who has committed an offence in terms of section 24F (2) (a) must immediately cease the commencement or continuation of the activity or activities that constituted the offence and take reasonable measures to mitigate degradation of the environment caused by the commission of the offence and to prevent further degradation of the environment.

Note: This provision creates a general obligation on any person that has contravened s.24F to cease what they're doing and to put in place measures not to make the damage worse. This is the "holding pattern" while decisions are made under the rest of s.24G. In the case of non-compliance with s.24G(1), EMLs can issue a further compliance notice.

- (2) A person who has committed an offence in terms of section 24F (2) (a) and who is unable to show, on a balance of probabilities, that the offence was not committed intentionally, must, to the satisfaction of the competent authority or the Minister of Mineral Resources, as the case may be, rehabilitate all degradation of the environment caused by the commission of the offence, without the option of applying for an environmental authorisation in terms of subsection (3).

Note:

- *A person who intentionally commences or continues with a listed activity without authorisation cannot apply for rectification, and must simply cease and rehabilitate. This is to prevent the cynical use of s.24G to avoid conducting an EIA.*
- *Note that the onus is reverse one – it is the violator who has to prove to authorities, on a balance of probabilities, that the offence was committed without the intention to do so. This envisages representations made by the offender to the competent authority, who would make a decision on a balance of probabilities. That decision, like any administrative action, would be subject to appeal and review. Note, however, that this does not trigger concerns about reverse onuses in the context of criminal proceedings that could fall foul of the presumption of innocence in s.35 of the Constitution.*
- *Importantly, repeat offenders would normally fall into this category – once you've been caught by s.24G on the basis of negligence or innocence, it would be virtually impossible to argue that you fall into any other category but the intentional one.*
- *Because there is no rectification application available, there can be no administrative fine – the fine payable by the person will be a criminal fine levied by a court.*

- (3) A person who has committed an offence in terms of section 24F (2) (a) and who, on a balance of probabilities, is able to show that the offence was not committed intentionally but is unable to show that the offence was not committed negligently, and who has –
- (a) complied with subsection (1); and
 - (b) paid an administrative fine determined by the competent authority in terms of subsection (7) below - may be directed by the Minister, Minister of Mineral Resources or MEC concerned, as the case may be, either to:
 - (i) wholly or in part rehabilitate all degradation of the environment caused by the commission of the offence, without the option of applying for an environmental authorisation in accordance with subsection (5);
 - (ii) wholly or in part rehabilitate all degradation of the environment caused by the commission of the offence, and apply for an environmental authorisation in accordance with subsection (5); or
 - (iii) apply for an environmental authorisation in accordance with subsection (5).

Note: This provision incorporates the current version of s24G but makes it applicable only to parties who have negligently commenced activities without authorisation, i.e. should have known that there was a requirement to apply but failed to do so, or should have had better control over the subcontractors who illegally commenced

without the authorisation being in place. In this instance, the offender must stop, contain all damage and pay the fine before the authorities exercise a discretion whether to allow that party to apply for rectification.

This discretion is important to allow authorities only to accept applications in situations where authorisation is an actual possibility – where authorisation would never be granted, then the person would simply have to rehabilitate under (i) above.

- (4) Subsection (3) applies to a person who has committed an offence in terms of section 24F (2) (a) and who is able to show, on a balance of probabilities, that the offence was not committed intentionally or negligently, except that such a person does not have to pay the administrative fine in subsection (3) (b).

Note: This provision makes the negligence provision applicable to “innocent” violators, but takes away the penalty. Innocent violators would be those who didn’t know and couldn’t reasonably have known that they required an authorisation, such as a member of a rural community without access to information about the legal requirements.

- (5) Where the Minister, Minister of Mineral Resources or MEC concerned, as the case may be, has directed a person to apply for an environmental authorisation in terms of this section, that person must:

- (a) compile a report containing -
 - (i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;
 - (ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;
 - (iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;
 - (iv) an environmental management programme; and
- (b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

- (6) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (5) and thereafter may-

- (a) direct the person to rehabilitate all degradation of the environment caused by the commission of the offence in terms of section 24F(2) (a) within such time and subject to such conditions as the Minister or MEC may deem necessary; or
- (b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

Note: Wording changed for consistency with previous sections.

- (7) The administrative fine payable in terms of this section may not exceed R10 million and must be determined by the competent authority having regard to all relevant factors, including the following:

- (a) the extent of the intention or negligence of the person who committed the offence in terms of section 24F(2)(a);
- (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment;
- (c) the degradation of the environment caused by the commission of the offence;
- (d) the behaviour of the person who committed the offence;
- (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence;
- (f) the degree to which the person who committed the offence has cooperated with authorities; and
- (h) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act.

Note: In this provision, the maximum administrative fine has gone from R5 million to R10 million. The factors are based on a combination of the factors for determining administrative penalties set out in s.59(3) of the

Competition Act and the factors for criminal penalties set out in s.52 of the National Environmental Management: Air Quality Act, 2004. This does not address problems of the lack of transparency regarding the determination of fines, and we would argue that this information should be made available to interested and affected parties voluntarily, i.e. without an application in terms of PAIA.

- (8) Except for a person mentioned in subsection (4), no application in terms of subsection (3) or any environmental authorisation issued in terms of subsection (6) (b) shall derogate from liability under section 24F(2).

Note: This provision is included to ensure that neither intentional nor negligent offenders can escape criminal prosecution. However, in the case of negligent offenders, any administrative penalty paid must be taken into account in determining the criminal fine. Innocent offenders are excluded from criminal liability.

- (9) A person who fails to comply with subsection (1) or a directive contemplated in subsection (3) or (4) or who contravenes or fails to comply with a condition contemplated in subsection (6) (b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F (4).

ANNEXURE C: COMMENTS AND INPUTS

From	Comment
Koos Pretorius, FSE	<p>It is about money. If the fine is less than the money lost due to a later start or no start at all, then the practice will continue. It also has to do with the reluctance from courts to make a developer level whatever is built. All the odds are in favor of doing the illegal action and rectifying it later on.</p> <p>Personally I don't think there is any need for it now. Everyone is aware of the need for EAs. If it has to stay, then the fine must be equal to the profit out of the development.</p>
Susie Brownlie, EAP and member of the CER's Expert Panel	<p>I question the need for a s24G application in its current form – to my mind, something done without permission should constitute a serious offence, and the penalty should be sufficiently onerous as to act as a major deterrent. Ideally, one wants to halt the perception that once you've effectively transformed a site you're guaranteed authorization, although it might take some time...since that provides an incentive to carry on transforming natural areas, potentially leading to irreversible / irreplaceable loss.</p> <p>I wonder if it would be helpful to consider different types of transgression – the first where developers simply go ahead with a listed activity and develop, knowing that asking for forgiveness is easier than asking for permission. They'd fall into the latter category where I'd see punishment being severe. Perhaps make it essential to 'undo' whatever development has taken place (i.e. remove structures/ infrastructure) and only then apply through the correct channels to NEMA EIA regs. I'd see measures to restore/ offset (where restoration is unlikely to be successful) essential in these cases.</p> <p>The second type of transgression could perhaps be treated differently - where an authorization has been granted, an EMP has been prepared but not yet given The Nod by the Department, and clearing of a site has been initiated accidentally by a construction team prior to formal acceptance of that EMP. [I know of several situations where the right processes have been followed and applications made, but there's been insufficient 'control' over construction crew on site....]. These are, for the most part, genuine unintended events. Some sort of penalty, yes. But nothing like for the first type of transgression. A repeat offender of this type should face a far heavier penalty....</p>
Charl de Villiers, consultant	<p>I would like to see the default presumption of guilt excised from s 24G by making allowance for an alleged transgressor to motivate her/his actions on the basis of 'noodweer' as defined in s 24F(3) of the Act.</p> <p>I consider it unacceptable that the <i>audi alterem partem</i> principle only applies to individuals who have been prosecuted under the Act, and not to people who have fallen foul of the law due to circumstances that may not be of their own making or required an urgent response in the face of imminent harm to the environment, people or property.</p> <p>Space needs to be created for the regulator to exercise discretion in deserving cases, and for members of the public to be offered a reasonable opportunity to explain their actions without fear of being assaulted by a randomly wielded administrative bludgeon which, it seems, the general culture by which the EIA regulations and specifically s 24G are enforced.</p> <p>This particularly applies to agricultural contexts where landowners often have inherited unsustainable patterns of land use and whose strategies for dealing with the environmental consequences of this state of affairs may not be desirable, but in many instances leaves the affected person little option but to act in self-interest without sufficiently interrogating the environmental consequences of that choice into account, or having the luxury of time to make that precautionary estimation.</p> <p>The effects of flooding immediately come to mind: drifts that are washed away, animals that</p>

	<p>cannot be watered or fed, crops, arable land and infrastructure that are damaged or destroyed, etc.</p> <p>The objective, surely, is to encourage, support and facilitate a move towards more sustainable land use practices through reason, resources and good example. These things do not happen overnight.</p> <p>We may be able to bash individual non-compliant farmers into lawfulness, but hyper-'paraat', prosecutorial law enforcement in its own right is certainly not going to cultivate a positive attitude towards farming that voluntarily promotes and pursues ecosystem resilience and sustainable rural development.</p> <p>Maybe a 'three-strikes-and-you're-out' policy is what is needed, but at least the first point of engagement between the state and alleged transgressor should be as neutral as possible, aimed at establishing facts, motives and effects, and helping to find solutions to difficult problems, rather than automatically reaching for the metaphorical ticket book and ballpoint pen in a leering flush of Schadenfreude.</p> <p>Also, administrative fines should be proportional to the irreversibility of environmental damage, its significance and the circumstances under which the unauthorised activity was undertaken. The calculation of the fines also need to be transparent and explicable, considerations that are entirely absent under the current dispensation.</p> <p>Directives i.t.o. s 28? Good suggestion, and especially if they can be applied in a non-punitive fashion. By all means, punish those who deliberately and obstinately do harm to the environment but, by the same token, demonstrate some understanding and flexibility where reason and reasonableness demand that.</p>
Mark Botha, WWF	<ol style="list-style-type: none"> 1. I think there should be a decision making framework to guide S24G – to limit the discretion of officials in their powers. Something along the lines of the decision hierarchy for offsets. Objective would be flushing out innocent errors, unforeseen consequences vs blatant disregard, flagrant flouting of ROD provisions etc. would need to think it through some more 2. It should link to post ROD mitigation actions – “post fact offsets” that are so substantial and costly that no one would use this as an excuse for not following proper process up front 3. Could also be a useful way to get offsets considered up front in developments – those developers that have put offsets in place could have a “presumption of negligence” clause waived... 4. Concur with the criminal fine approach vs. an administrative fine. There should be some guidance to separate the two streams, as I’m sure there will be cases where an admin fine would be sufficient for lesser offences. 5. S24G must turn out to be punitive in nature for the bulk of applicants, and the fines should be commensurate.
Hout Bay & Llandudno Environment Conservation Group	<p>In principle, as a purely practical expedient, there is nothing exceptionable about a regularisation provision. In general it should not give rise to the <i>ex post facto</i> regularisation of any development or land use that would not have been authorised had authorisation therefor been sought before commencement with the relevant listed activities entailed therein. Any decision purportedly made in terms of s 24G(2)(b) authorising an environmentally unsustainable development or land use would be irreconcilable with the objects of the Act and liable, on that ground, to be impugned and set aside on judicial review.</p> <p>The obviously undesirable feature of the provision as it is currently formulated, however, is the subliminal incentive it provides to the competent authority - whether that be the Minister, the MEC or the Minister of Mines - to trade the giving of <i>ex post facto</i> environmental authorisation for much needed revenue in the form of administrative fines (albeit in a</p>

	<p>maximum amount five times less than the maximum fine provided in terms of s 24F(4) by way of criminal sanction for commencing with a listed activity without prior environmental authorisation). The difference is that an administrative fine goes directly into the coffers of the competent authority, while a fine paid by way of criminal sanction goes into the National Revenue Fund to be disposed of in terms of the national budget and the annual Division of Revenue Acts.</p> <p>The provision for an <i>ex post facto</i> regularisation of a listed activity commenced without the required prior environmental authorisation should not derogate from the criminal liability of the person who so commenced the activity without authorisation. In other words, the competent authorities should not be constituted as judge, jury and executioner in respect of criminal contraventions of the provisions of the Act and should be restricted to fulfilling their administrative function of ensuring that development and land use is environmentally sustainable. Section 24G, as currently worded creates an unwholesome confusion of the competent authorities' functions within the Act's statutory objectives.</p> <p>Dealing with the punitive consequences of contraventions of the Act should be left to the independent institutions constitutionally created for those purposes, namely the prosecuting authority and the courts. Section 24 (2A) should therefore be repealed and substituted with a provision something like this:</p> <p>'Any application in terms of subsection (1) and any environmental authorisation issued in terms of subsection (2)(b) shall not derogate from the applicant's liability in terms of section 24F(4) for having failed to comply with, or having contravened section 24F(1)(a) or (b).'</p> <p>It is arguable that s 24G(2A), as currently worded, offends against the doctrine of separation of powers and is unconstitutional.</p>
<p>Nicole Barlow, ECA</p>	<p>One part of me is loath to advocate the complete abolition of the Section 24G process because it does at least afford the environment some justice, if the process is run correctly. ...The Section 24G process is actually a tool that's used by the developer to develop in a sensitive area, especially if he feels he won't get authorisation from the outset. Bribes are paid by the developers to the officials and the development is inevitably allowed to continue. The defence of the developer has become known as the "scrambled egg" approach, they state the damage has been done so they might as well be allowed to continue and of course they quote at length all the jobs that will be lost, etc. The fines were ridiculously low when compared to what the developer stood to gain from his development continuing.</p> <p>I'd like to see certain conditions placed in the Section 24G regulations such as exclusions, if you build in a wetland, or in any really sensitive area, you cannot do a Section 24G, you go straight to illegal, demolition and rehabilitation.</p> <p>I'm not sure if this is feasible, but all Section 24Gs should be handled by the National Department of Environment, not that I think they are any better if you look at the RoD for the Pan African Parliament, but they might be a little more immune to the high levels of corruption than the provincial departments.</p> <p>Section 24G fines should not be negotiable, they should be so high that they actually serve as a deterrent. The fine should equate to 50% of the total value of the whole development, which essentially means that the development will have NO profit margin and the fine has to be paid upfront and cannot be appealed. My only problem with making it part of a criminal process is it means they have to go through court, not only is this time consuming and cumbersome due to the extreme problems at all courts at the moment, but then the decision is left with a judge who has no understanding of the environment and the consequences of what the developer has done. I've seen shocking decisions made by even the best and longest standing High Court Judges...</p> <p>The one problem is that many developers work across different provinces, which is also why I</p>

	<p>suggested the National department take over Section 24G's, because if you want to implement a system where you only get to make ONE mistake, and that if you've already had a Section 24G you can never submit another one, how do control that without a central system.</p> <p>The directors of companies should also be held personally accountable. They need submit the application under each directors Identity number, because the directors can dissolve one company, start another company and keep repeating these mistakes.</p> <p>If we go for a total abolition of the Section 24G process as it stands at the moment, then it has to be replaced with something better and stronger, you cannot remove it and leave this gaping hole where there was once at least some semblance of repercussion for a developer that broke the law. But, Section 24G as its currently written is weak, open to enormous levels of corruption, is not being enforced properly and the fines are so low they serve as no deterrent what so ever.</p> <p>I hope my layman's suggestions can assist.</p>
Adv Tsheko Ratsheko, Johannesburg Bar	<p>I have not been following on the implementation of section 24G (and have not seen the latest proposed amendments) but it appears that it remained an ex post facto authorisation - which was only an aspect of its purpose. All section 24G applications were generally approved once the administrative fine was paid.</p> <p>Section 24G(2)(a) authorises the Minister or MEC (after considering the report and payment of a fine) to direct persons to cease the activity and rehabilitate. This aspect of the section is not implemented (at least to my knowledge).</p> <p>Problems with this section is that:</p> <ol style="list-style-type: none"> 1. Section 24G(2) is couched in permissive language – where it matters most ie execution of the decision: ...”upon payment of the administration fine not exceeding R1m, the Minister or MEC must consider the report and thereafter may (a) direct the person to cease....or (b) issue authorisation.. (proposal is to change it as follows...thereafter[<u>may</u>]<u>must</u>.. 2. We should then add a section which requires the Minister or MEC to publish reasons for either decision taken 3. I do not recall if guideline for calculating an administrative fine was ever a publish as a regulation. The calculation is not clear and the administrative fine must also be increased 4. Avoidance (See attached legal opinion) Note: This legal opinion from senior counsel concludes that the disadvantages of applying for s.24G outweighs the advantages of doing so.
Margie Donde	<p>As far as I understand it 24G is used when someone does not know that what they were doing was illegal – i.e they did not know the law.</p> <ul style="list-style-type: none"> • Section 24G fines should not be negotiable, they should be so high that they actually serve as a deterrent. The fine should equate to 50% of the total value of the whole development. Developers in our area build in the cost of the 24G if they get caught. Therefore it is not a deterrent – rather they use it as a way to do what they want and if they get caught they have a process by which they can then become legal. • The directors of companies should also be held personally accountable • If you are in contravention once you should not be able to state ignorance a second time and they should then have to demolish the whole development • You should not be able to appeal the fine – we have an illegal cement factory in our area that has used the 24G process to continue their cement making – they do sidings for Gautrans- while they appeal the fine – this has now been going on for 3 years! • The development/ illegal activity should stop until all fines are paid and rectification is done
Aiden Beck,	I think we are seeing a lot of these original 24G obligations falling by the wayside in the

Oyster Bay Reserve	Mossel Bay Desalination Plant, that MEP has a concern with.
Paul Hoffman SC Director Institute for Accountability in Southern Africa	Surely the best medicine for the “gewraakte” section 24G is a good draft of euthanasia vanishing oil, administered liberally to its entire body until it disappears completely?
Angela Andrews, LRC	One of the issues is the fact that the fines are apparently not very high and are determined (I hear but need to check) by guidelines from DEAT or somewhere else where fines are worked out. I need to find out about this. The net effect is that provincial authorities feel that they don't have much say in the fines. In some of the more remote provinces I hear that there is a lot of bullying of officials by errant developers who use strong arm tactics and political pressures. It is estimated that in some provinces up to 15% of developments go through the 24G route. So NEMA is being completely undermined. Not sure what the solution is. Abolish 24G!!! Or make 24G go through the central government where there is less corruption. All this has to fit in to the NEIAMS strategy as well so I don't know why it is being dealt with in a piecemeal process.
Yolan Friedmann, EWT	The environmental legislation in this country must be the only case of ‘ignorance of the law is not only a good excuse but allows you to be forgiven with the right paperwork...’ by its very track record, S24g can be called a failure, even if its intentions could ever be said to be pure...
Rynette Coetzee, EWT	Indeed food for thought. I think there are too many people who are abusing the S24G system, by initiating development or any listed activity without the necessary permits, as they know they will most probably get away with an administrative fine. However, if the fine was linked to a crime (admission of guilt with a criminal record) they may think twice before actually embarking on such illegal trips. I am just thinking of the quarry on the Bronberg (where the Juliana's Golden Mole sole colony exists) and the fact that they are still doing whatever they please, irrespective of an administrative penalty and a mining ROD that was apparently only valid for five years. I am still trying to get to the bottom of this problem. In the mean time they are excavating into the habitat of these moles (listed as Vulnerable on the IUCN Red Data List) and no government authority wants to take action.
Patrick Dowling, WESSA	<ol style="list-style-type: none"> 1. Does s24G fulfill some function? Is there a need for a mechanism to authorise illegal listed activities? Or should it just be abolished and rehabilitation be dealt with under a s28 directive (or activities stopped and a fresh EIA application be submitted)? Though there may well be instances when <i>bona fide</i> mistakes are made and regularization would be apt, the presence of this clause will unfortunately be exploited ito of easier to ask for forgiveness than permission. Would be better to review activities that trigger EIAs. 2. If so, in what circumstances should a violator be allowed to submit a rectification application? None. 3. Should a violator be allowed to submit more than one rectification application? No. 4. Should an authority have a discretion to accept a s24G application, or should all applications at least be processed? No discretion. Very minimum should be new process with I&APs (perhaps a shortened one) 5. What about that administrative fine – should this perhaps be in the form of a criminal fine imposed in terms of a plea and sentence agreement in a guilty plea? (which will at least give the applicant a criminal record)? Would be contradictory to spirit of amendment
Andrew Muir, Austen Smith	<ol style="list-style-type: none"> 1. Does s24G fulfill some function? Is there a need for a mechanism to authorise illegal listed activities? Or should it just be abolished and rehabilitation be dealt with under a s28 directive (or activities stopped and a fresh EIA application be submitted)? <p>I BELIEVE THAT S24G IS A VITAL PART OF THE ADMINISTRATIVE PROCESS. THE CRITICAL ISSUE IS TO BRING ALL POTENTIALLY DAMAGING DEVELOPMENTS / ACTIVITIES TO THE ATTENTION OF THE AUTHORITIES. THEREFORE THE PROCESS SHOULD ENCOURAGE A GENUINE DEFAULTER WHO DIDN'T KNOW BETTER TO REPORT A MISTAKE TO THE AUTHORITIES AND TO HAVE THE MISTAKE ASSESSED. I DON'T THINK THE CURRENT MODEL PROVIDES ENOUGH ENCOURAGEMENT TO THE ACCIDENTAL DEFAULTER.</p>

	<p>2. If so, in what circumstances should a violator be allowed to submit a rectification application?</p> <p>A DEFAULTER SHOULD BE ENCOURAGED AND ASSISTED IN REPORTING NON COMPLIANCE AND SHOULD AUTOMATICALLY BE PENALISED, OR RATHER A LIGHT PENALTY FOR NON COMPLIANCE, IN THE FORM OF A SMALL ADMIN FINE SHOULD APPLY TO A FIRST TIME DEFAULTER. HEAVIER FINES CAN BE LEVIED AGAINST REPEAT OFFENDERS OR IN SITUATIONS WHERE MORAL WRONGDOING E.G. A MAJOR DEVELOPMENT WHICH A DEVELOPER SHOULD KNOW REQUIRES AUTHORISATION, IS APPARENT.</p> <p>3. Should a violator be allowed to submit more than one rectification application?</p> <p>YES, GET THEM INTO THE SYSTEM WHERE THEY CAN BE PROPERLY ASSESSED AND DEALT WITH APPROPRIATELY. THE BALANCE NEEDS TO COME INTO THE MODEL TO PREVENT S24G BEING AN EASY ROUTE OUT.</p> <p>4. Should an authority have a discretion to accept a s24G application, or should all applications at least be processed?</p> <p>ALL APPLICATIONS SHOULD BE PROCESSED BUT, THE OUTCOME MAY BE NO APPROVAL WITH AN REHABILITATION ORDER. AUTHORISATION MUST NOT BE A FAIT ACCOMPLI AND THERE NEEDS TO BE A STRENGTHENING OF THE MECHANISM TO PROVIDE FOR THE REHABILITATION PROCESS.</p> <p>5. What about that administrative fine - should this perhaps be in the form of a criminal fine imposed in terms of a plea and sentence agreement in a guilty plea? (which will at least give the applicant a criminal record)</p> <p>Any other thoughts and particularly suggestions for improving s24G will be incorporated into a submission to DEA.</p> <p>THE ADMINISTRATIVE FINE SHOULD BE MINOR, IT SHOULD ONLY BE THERE TO ENCOURAGE THE CORRECT PROCEDURE AND TO PUNISH NON-COMPLIANCE. IF, ONCE THE ASSESSMENT HAS OCCURRED IT APPEARS THAT HARM HAS BEEN DONE THEN FURTHER PUNISHMENT MUST BE AVAILABLE AND MUST BE USED. THEORETICALLY THE HARM COULD HAVE BEEN AVOIDED THROUGH THE EIA PROCESS AND THE FACT THAT THE PROCESS WAS IGNORED MEANS THAT THE PERSON LIABLE MUST BE PUNISHED AS NECESSARY. THIS SHOULD BE IN THE FORM OF A PUNITIVE REHABILITATION ORDER WHICH SHOULD BE ADMINISTRATIVE AND NOT CRIMINAL. THUS AN INNOCENT WRONGDOER WOULD BE FACED WITH A LIGHT ADMIN FIN TO PROCESS THE APPLICATION AND, IF HARM HAS BEEN CAUSED, A FURTHER ADMIN PENALTY PROPORTIONAL TO THE HARM CAUSED.</p> <p>A WILFUL WRONGDOER WOULD AND MUST, ALSO FACE CRIMINAL PROSECUTION WHERE PUNISHMENT IS CALLED FOR BY THE CIRCUMSTANCES.</p>
Mercia Komen	<p>In a nutshell, I am proposing that transgressors be severely fined; that rehabilitation or remediation be funded by the transgressor; that the affected parties (or the environment where no one cares) are able to discern where the fine has been used to right the wrong in the receiving environment.</p> <p>The latest compliance and enforcement report indicates that almost every province deals with "illegal listed activities" as a prevalent crime. I surmise that this results in a great deal of unit's time being spent on functions which should be done by impact assessment and management. Consequently we create massive inefficiency. <u>Suggestion:</u> I do not say this lightly, but it seems more pragmatic for EMI's to assess the contravention, and follow the prescribed process for contravention. This should be a discretely separate process from the attempts to rectify. The transgressor should pay the penalty (and/or do the time) and then be required to place before the competent authority two separate documents - one the application document which would have been required for the development which now exists, and the other a rehabilitation plan for the development which exists. Placing both these documents as separate proposals before the competent authority reduce the tendency to assume that the development will/should be left intact.</p>

Suggestion: I would also propose that the fine should be correlated with the value of the development. It is no deterrent to ongoing crime, or compensation for the resulting administrative burden for transgressors to be fined so low that it is a viable financial alternative to conducting the required process.

I am saying, for example, that if the development is valued at R 5 million, the fine should be R5 million where the **development will be retained**.

The State should then deploy that fine specifically in the area of the development and specifically to balance the negative environmental impacts on the Interested and Affected parties. This is not in place of what the transgressor may be required to do, but in addition to. It should be very clear to the I&AP how and where the penalty has been applied.

In the case where the development **will be demolished**, the R 5 million fine used in this example may be used to offset the remediation costs. I would hasten to add that the service provider should be appointed by the State for the portion of the rehabilitation that will be funded by the fine.

I take cognisance of the administrative burden my solution is placing on a finance function. I feel that Section 24 G application harm the I&APs twice over - and we need to take that into account, and it is the I&APs who need to KNOW that things have been set right.

My experience with 24G has the following frustrations:

1. The rectification option is generally assumed to be the final outcome. There is insufficient attention on the transgression, and the option to rehabilitate.
2. The process is often hurried, inadequately dealt with and the assessment of the impact minimised.
3. Public participation is poor - process is poorly communicated, the attitude of the transgressor /consultant is not conducive to engagement (as the deed is already done)
4. The authority to force the transgressor to rehabilitate must be clear, and there has to be willingness to go that far (and then be widely publicised)
5. On the one hand the REAL impacts are available, and should be reported in detail, including an evaluation of how the transgressor self-regulated. This will attest to the sense of accountability and responsibility of the transgressor and should be factored into the decision making. Someone who both transgresses and needs to be compelled to be environmental responsible cannot be regarded as civic-minded. On the other hand, the transgressor cannot fully report on impacts because some of the impacts will have irreparably destroyed environmental elements. The assessment in some ways needs to be MORE comprehensive, looking wider than the subject property.
6. Where the transgression is in keeping with the strategic/ spatial plans for the area or precinct, the focus needs to shift to cumulative impacts - to answer the question, would this development be consider "one too many". If this is not the case, the transgressor should be fined severely, and as discussed above, the fine used for a local project which will have a long-term positive impact on the local environment (a buy-back centre in an industrial area, a park for workers to enjoy in their breaks, establish an environmental centre in the nearest dormitory, etc.

There is the case of the **[name provided]** Lodge in the **[name provided]** Protected Environment. The provincial authority dropped the ball, but were reluctant to deny authorisation when the situation was forced into the S24G process. The consequence is a travesty of the law which provides for formally protection of special areas (NEM:PA). The **[name provided]** Protection Association is in court on this case - a typical S24G scenario of power and influence riding roughshod over the law. This is the example we need to prevent while still allowing a mechanism for those who are foolish and ignorant not to lose developments which are beneficial to society.

In this instance the developer convinced province that too much money had already been spent and that demolishing the lodge was not an option. Here the authority did not adequately evaluate the precedent being set, and how it was failing (would in the future be compromised...) to give effect to the NEM:PA. Sometimes an offset is not possible, and

	<p>weighed against the long-term implications and trends, the only answer is severe penalties and the long road of rehabilitation. The great risk is that a spat of "bankruptcies" follow. It should then be clear that the conditions apply to a new owner, even where the owner is a financial institution. In this way, we will foster more attention to environmental law by all parties (including financiers), and need but a few costly examples to pave the way.</p> <p>I feel sure I have added nothing new. Thank you for the opportunity to at least feel empowered to do something about the issue.</p>
Cara Stokes, consultant at CSEnvironmental	<ol style="list-style-type: none"> Does s24G fulfill some function? If there is a delay from the department side and the applicant had begun their EIA application, but just administrative action was not followed by the department in authorising the activity, and/ or if the activity had other major financial or environmental consequences if the project was not to go ahead immediately. Is there a need for a mechanism to authorise illegal listed activities, if the activity was conducted in a response to an emergency? Or should it just be abolished and rehabilitation be dealt with under a s28 directive (or activities stopped and a fresh EIA application be submitted)? Rehab should still be dealt with in terms of s 28 directive. If so, in what circumstances should a violator be allowed to submit a rectification application? If it was in a response to environmental emergencies or public interest (This could include activities such as upgrading roads which are already existing or upgrading sewerage farms) or an exemption route was not explored/ or the EIA regulations have changed and limits which were previously adopted and are no longer adopted should now be deemed exempt from any 24G application due to the recent changes. Should a violator be allowed to submit more than one rectification application? Yes, but the judgement of each 24 g should be based on its response to environmental emergencies or public interest, one town could be particularly bad and the mayor may be the person applying for the section 24G's. Should an authority have a discretion to accept a s24G application, or should all applications at least be processed? Applications should be processed by a panel of respected environmental/ legal government professionals, where if blatant disregard for environmental matters concerning a particular project were obviously exercised and the violator cannot prove that they took any reasonable measures to ensure that environmental matters were considered the violator should be given a criminal record which can be plea bargained in terms of a community service sentence as well as a monetary fine which shall be partially used to fund a particular community project that the violator must engage in. The community projects must promote the interests of sustainability and show that fines are being used to promote the interests of sustainability and not otherwise used to promote individual interest. After 5 years a 24G applications should only engage emergency responses. If a violator is found to having had engaged in an activity the requires an EIA after a 5 year period (No emergency response can be proven) they should be charged in terms of section 24 and the EIA regulations where criminal sentences could be converted to sustainable community service and rehabilitation directives are issued or the judge orders the violator to follow any instructions given to them by the relative department involved in the 24G application.
Carolyn Schwegman, WESSA	<p>s24G does not in any way seem to be a deterrent to those developers (including municipalities who do know the legislated EIA procedures) to 'fast track' a development seeking to legalise it once begun or completed. Not many applications have come across my desk but in almost every case the fine has been reduced by almost 50% on appeal by the applicant. This seems to trivialize the process.</p>
Judith Taylor and Rachel Adatia, ELA JHB	<p>Does s24G fulfil some function? Is there a need for a mechanism to authorise illegal listed activities? Or should it just be abolished and rehabilitation be dealt with under a s28 directive (or activities stopped and a fresh EIA application be submitted)? – I propose the latter</p> <p>If so, in what circumstances should a violator be allowed to submit a rectification application? – Dependant on the severity of the violation, in the case of blatant violations, the violator must pay all rectification costs and be disbarred from continuing</p> <p>Should a violator be allowed to submit more than one rectification application? - NO</p>

	<p>Should an authority have a discretion to accept a s24G application, or should all applications at least be processed? – They be processed</p> <p>What about that administrative fine – should this perhaps be in the form of a criminal fine imposed in terms of a plea and sentence agreement in a guilty plea? (which will at least give the applicant a criminal record) – Yes</p> <p>Regarding the fine - definitely should be a criminal fine, and I think it says a max of R1 million in the act - which seems very low to me! Should they not be fined in proportion to the cost of the development - a % of cost/expected profit?</p>
<p>Chrissie Cloete Obo Plettenberg Bay Community Environment Forum</p>	<p>Our experience of this has not been a positive one, particularly with the current drought situation and following the floods that we experienced in the Southern Cape in 2007/08.</p> <p>We believe that the S24G process is being abused by developers and some authorities as a loop hole to fast track their agendas and to avoid the delays associated with following the normally required processes.</p> <p>The Bitou area is currently faced with what we believe to be badly managed water resources and associated infrastructure which is impacting severely on our rivers, wetlands and estuaries. Much of this can be associated with fast tracked developments, including the installation of a desalination plant without proper studies being implemented and the abstraction of water in dry periods when rivers are running below the required reserve. In addition to this, bank stabilisation is taking place without a holistic approach, rocks are being dumped into the sea and estuary to prevent erosion and sea walls and gabions are being installed. When queries are made about these activities, we are told that the constructions are being done during/in response to "emergency" situations and following a S24G process.</p> <p>We believe that there should be appropriate financial penalties involved with following this process and that it should only be utilized during legitimate emergencies - this to be determined by a special committee/authority. Stricter penalties for unauthorised developments, such as having to demolish the building site and enforcing rehabilitation of said area, would discourage developers to abuse the S24G process.</p> <p>We hope that this situation can be remedied and that stricter controls will be put in place.</p>
<p>Chris Galliers, WESSA</p>	<p>Section 24G of NEMA has long been an issue of contention where there is potential for abuse by proponents. The major challenge that is needed, is where a reasoned and fair process is implemented that will deter developers from a “develop now and seek forgiveness later” attitude, rather than get authorisation through a legal process. At the same time there is merit in having a process that also employs discretionary input.</p> <p>Concerns:</p> <ol style="list-style-type: none"> 1. Having a fixed limit on the payable fine, needs to be changed. The fine needs to take into account the financial scale of the development. Developers should not see S24G as a process from which they are able to benefit. WESSA has witnessed numerous examples where the fines given for a transgression have been almost welcomed by the proponent. What may have looked like a substantial fine is rendered insignificant once one analyses the scale of the development and the financial benefits accruing in both the short and long-term. The solution is to have realistic fines that are relative to the scale of the entire development and the formula used to get to the fine amount is one of transparency. 2. As S24G applications are often made as a result of not having attempted an EIA. This can be beneficial to the applicant who uses this avenue as a way of avoiding public involvement. There is no I&AP involvement in the S24G process. Public participation may well be able to add value, especially if an external review panel for S24G applications was constituted. In addition, such a review panel could be used as a monitoring committee to make sure that the terms of reference from the final decision has been complied with. 3. A significant failing is that alternatives are never considered in this process. 4. It is also hard to measure the impact of the project if you don't have the background information, so what scale will be used by the developer in measuring damage?

	<p>So, the following needs to be assessed by the specialist:</p> <ul style="list-style-type: none"> • The scale and magnitude of the impact? • Whether the transgression was a bona fide mistake? • Was irreparable damage been done to the environment? • What is the loss in terms of ecosystem goods and services? • What is the loss to heritage, sense of place, cultural or pure existence values? • The pre-impacted area must be described • A full evaluation must be done of the site suitability and alternatives had no development occurred. • Develop a public participation and input and social context of the development • Alternatives for existing illegal infrastructure • Environmental impacts of illegal structure needs to be considered • Consider secondary impacts • Detail the impact and potential for rehabilitation. • Provide scenario based alternative courses of action with recommendations. <p>5. Is there a register of offenders kept by authorities so that if a second application is submitted by the same developer, then it is taken into account?</p> <p>6. Another concern is that S24G can also be misused by the authorities. It can be a tool that looks to rectify errors that they did not identify in the first place. This means that although there are numerous concerns with regard to S24G, there are many linked issues that need to be addressed (such as having sufficient compliance and monitoring capacity) in order to prevent the need for S24G application submissions.</p> <p>7. The S24G process involves the appointment by the developer (or perpetrator), of an EAP, to produce a report containing mitigation measures. The issue of independence is raised and thus the need for some level of public participation involvement and independent review panel is needed to add balance to the process. This is definitely a case whereby the competent authority could appoint an independent consultant rather than the developer.</p> <p>8. In serious cases (a list of criteria that determines what constitutes being serious needs to be established) there should be little room for negotiations and no attempt should be allowed to validate any illegal development or part thereof. The developer should start with rectification and rehabilitation and only then once complete, could the developer apply to start an EIA. What is needed is a process that reflects genuine independence (without fear or favour), accountability, sound agreed methodologies and stiff penalties which includes full rectification/rehabilitation. At the rate at which we are experiencing land transformation, we cannot afford an almost impunitive process.</p>
Prof.Tumai Murombo, University of the Witwatersrand	<p>My 2 cents is that only person who violate the EIA laws without knowledge of the EIA laws should be entitled to S24 G rectification (i.e. Applicants who did not know and could not reasonably have known that the activity concerned required an EIA). Otherwise applicants who knew and should have reasonably known of the legal requirements must simply be penalised through s 28, 24F and be asked to stop and rehabilitate without the option of a rectification procedure. And remember everyone is presumed to know the law! It follows that a person, company or connected other cannot submit this application more than once, as by then they develop the necessary knowledge of the legal requirements for activities they are likely to engage in.</p>
Lea September, consultant at ILISO (and doing Masters in Env Management on this topic)	<p>If S24G is to serve its purpose and make a positive contribution to environmental management and governance, it is absolutely necessary that it be supported by effective enforcement. Otherwise, it is simply handled as a formality/rubber stamping exercise, adds no value, and encourages abuse (both by the public and private sector).</p> <p>Deliberately bypassing a lengthy and costly EIA process can as a result become an attractive option because the possible fine incurred and the risk of prosecution is relatively low, and the likelihood of receiving an environmental authorisation is relatively high.</p> <p>The fine system contains potential for corruption, I am not sure how that can be addressed.</p> <p>The fines applied in terms of S24G are hardly a deterrent for corporate offenders to deliberately bypass the EIA process and accordingly do not prevent repeat offenders.</p> <p>The issue of fines should be envisaged together with that of enforcement to avoid repeat</p>

	<p>offenders.</p> <p>EAPs also have a role to play in informing proponents of the proper process for obtaining environmental authorisation; some EAPs have recommended that proponents commence activities before the EA is issued, resulting in unnecessary S24G applications.</p>
John Wesson, National Association of Conservancies of South Africa	<ul style="list-style-type: none"> • The process needs to be more transparent especially the determining of the fine on their scale. One or two stakeholder NGO representatives should be party to the allocation of points by a senior official. Looking at the criteria of the scale it is a joke as one will find the person allocating the points has never been on site. • There should be a min of say 10% of the value of the development as the baseline for determining the fine • The six month amnesty period ended in 2005. Anyone breaking the law now should be charged in court and have a criminal record if found guilty by a judge • Open to corrupt practices “easier to plead for forgiveness than follow the law” • Illegal developments in protected areas should be equal to poaching in the severity of the punishment • The establishment of No Go areas as proposed to the ministers will remove the “did not know” aspect • Ignorance of the law cannot continue to be used as an excuse and that is what 24G is in effect • The judge should decide on demolition and rehabilitation as part of the sentence